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# LAND RIGHTS QUEENSLAND STYLE

THE STRUGGLE FOR ABORIGINAL  
SELF-MANAGEMENT



Frank Brennan

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## LAND RIGHTS QUEENSLAND STYLE

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# **LAND RIGHTS QUEENSLAND STYLE**

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SELF-MANAGEMENT**

**Frank Brennan SJ**



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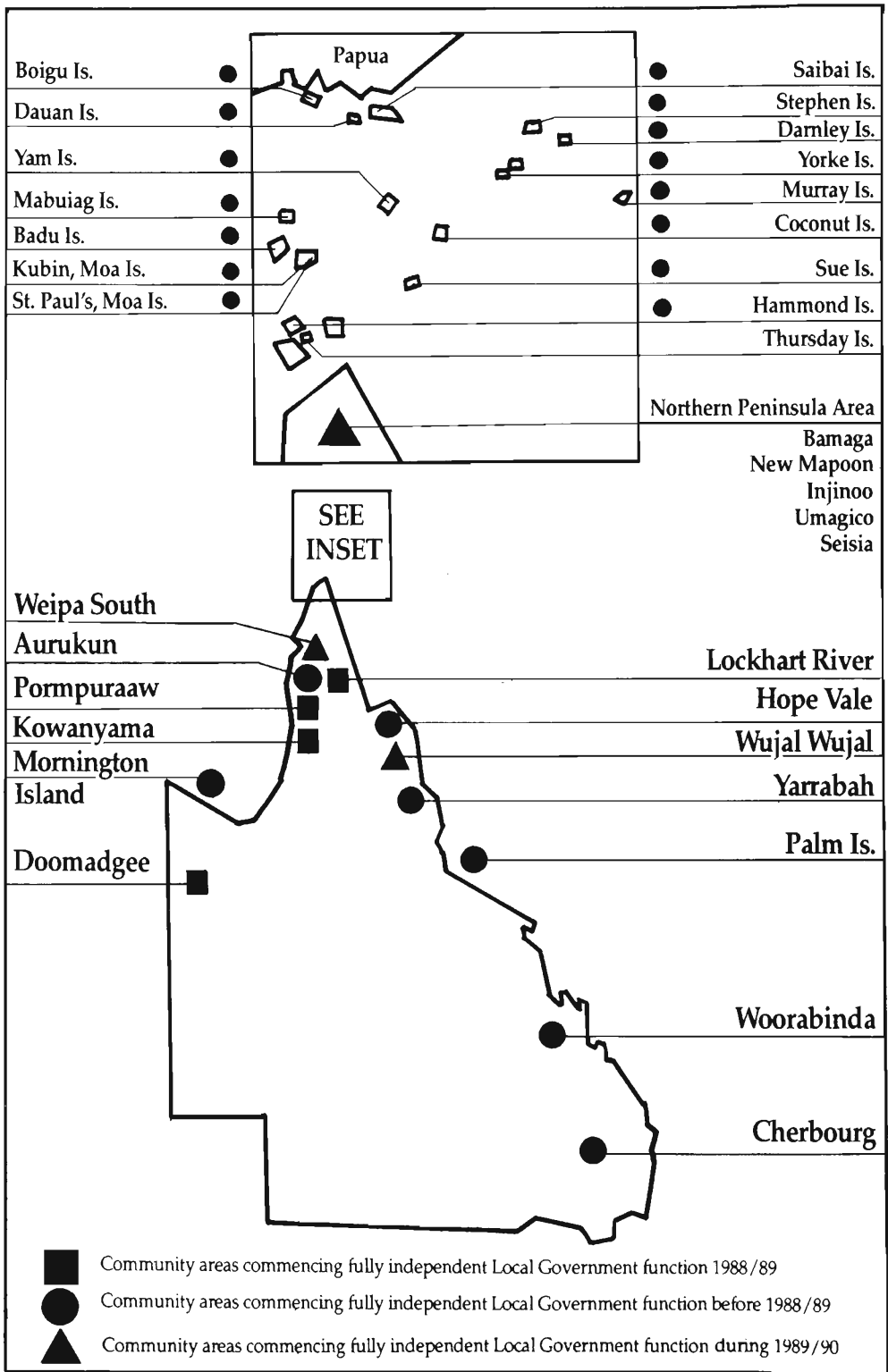
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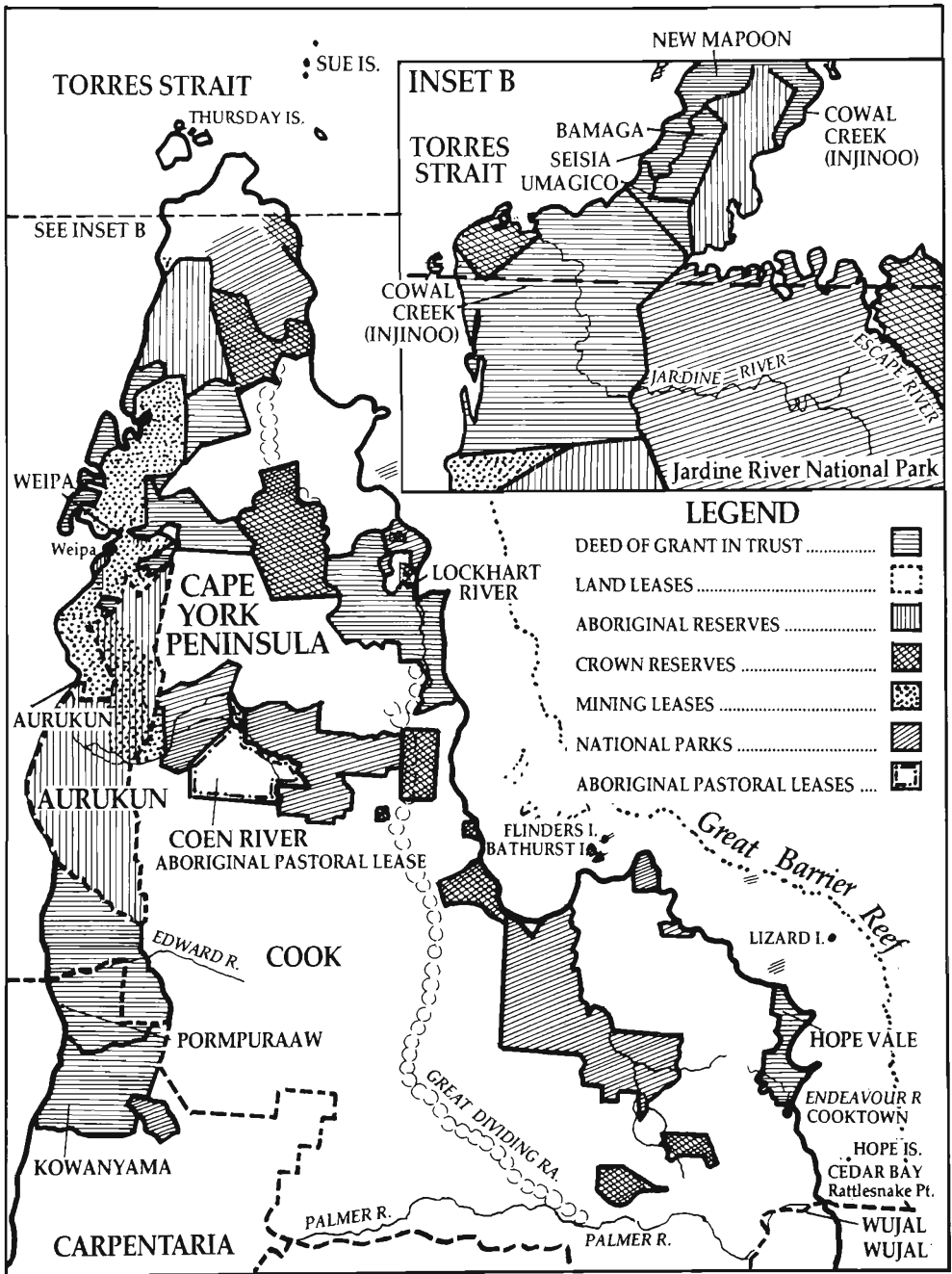
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Map 1. Aboriginal and Torres Strait Island Communities

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Map 2. Land Tenures in Cape York

## ABBREVIATIONS

AAC	Aboriginal Advisory Council
ACC	Aboriginal Co-ordinating Council
ADC	Aboriginal Development Commission
ALP	Australian Labor Party
ATSIC	Aboriginal and Torres Strait Islander Commission
DAA	Department of Aboriginal Affairs (Commonwealth)
DAIA	Department of Aboriginal and Islanders Advancement
DCS	Department of Community Services
DOGIT	Deed of Grant in Trust
FAIRA	Foundation for Aboriginal and Islander Research Action
FLC	Queensland Federation of Land Councils
NAC	National Aboriginal Conference
WCC	World Council of Churches
s	section of legislation



## A DEDICATION

Aurukun was dry in May 1982 - no rain and no grog allowed. I was standing outside the community store. A drunken Aboriginal man staggered towards me, introducing himself: "I Johnny Koowarta. Sorry I drunk. I bin Weipa. I bin breakin' the seal of the Queensland government. Me first man break that seal." I realised this was the person who the previous week had won an historic victory in the High Court of Australia against the Queensland government. John was one of the traditional owners of land at Archer River Bend in Cape York. The Commonwealth's Aboriginal Land Fund Commission had allocated funds for the purchase of the pastoral lease on his land. The Queensland government had refused to transfer the lease because cabinet thought Aborigines already had enough land. In September 1972 cabinet had decided "the Queensland government does not view favourably proposals to acquire large areas of additional freehold or leasehold land for development by Aborigines or Aboriginal groups in isolation". This racially discriminatory policy was struck down by the High Court. John had heard the result of his case on the radio news. He knew nothing of the detail.

Next day John came back sober. We sat under a tree and spent all morning working through every line of the complex High Court judgment. John was proud and happy. He autographed my copy of the judgment. In

1990 I heard John speak at a conference on "Two Laws and Two Cultures" at the University of Queensland. To the surprise of land rights activists he proclaimed his simple Christian message: "We are all one." In his later years, John took on an almost evangelical role. On 19 February 1991, I had the great pleasure of introducing John to Sir Ninian Stephen. Sir Ninian had been one of the judges who heard John's case. He had concluded his judgment in John's favour, saying that the withholding of approval by the Queensland Minister for Lands "once explained by reference to the settled policy of his government, amounted to a refusal to permit that to occur and accordingly constituted a refusal to permit persons, then possibly unknown to him but who in fact included Mr Koowarta, to occupy land by reason of their race."<sup>1</sup> The retired Governor-General asked, "Do I understand that you still do not have title to your land?" John replied, "That's right, sir." Sir Ninian expressed his dismay and John beamed with pride that he was known by the highest in the land as the one who had broken the seal of the Queensland government.

When the Goss government was elected, the new minister for Aboriginal affairs in Queensland, Ms Anne Warner, assured John that he would receive title to his land. His solicitor told me the sad news of John's passing in August 1991. His legal file is now closed. He never did get his land. His name will always be associated with the outlawing of racial discrimination in Australia. He was justly proud. I dedicate this book to John and others like him who have devoted themselves to retrieving their land and their culture in the most adverse circumstances. Of those living, I mention Rachel Cummins, Roy Gray, Tom Geia, Richard O'Brien, Lester Rosendale and Don Fraser. I was privileged to witness their sustained and reasoned stand for land rights when they were starved of resources, media interest and parliamentary access. Their stand effected change even during the Bjelke-Petersen years. Their people are the ones who have long suffered land rights Queensland style. Some of their people now hope to gain something from land rights Queensland style.

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1 (1982) 39 ALR 417 at p. 457.

## INTRODUCTION

In 1981 Alwyn Peter stood charged in the Queensland Supreme Court with the murder of Deidre Gilbert. Both of them were residents on the Aboriginal reserve at Weipa in Cape York, far north Queensland. Ultimately Alwyn pleaded guilty to manslaughter. His senior counsel Mr Des Sturgess explained to the judge that both Alwyn and Deidre had been shaped by life on a Queensland Aboriginal reserve and each of them in their own way had been destroyed by it. Sturgess told His Honour that one did not have to be bad or mad to live in such a community; one had only to be an Aborigine. The homicide rate on these reserves in those days was the highest recorded amongst any group in the western world. As junior counsel for Alwyn, I spent some months with dedicated staff from the Public Defender's Office marshalling the testimony of the nation's leading anthropologists, psychiatrists, psychologists on Aboriginal cognition and sociologists. Each according to their discipline predicted causes and prescribed solutions for the predicament of Alwyn and Deidre.

At about the same time, the then premier of Queensland Mr Johannes Bjelke-Petersen met with Queensland church leaders to discuss proposed changes to laws relating to Aborigines. Shortly thereafter I was appointed adviser to the Queensland Catholic bishops on Aboriginal affairs,

a task which I have performed for the last decade. During that time I have been available as an advisor to various Aboriginal groups throughout Queensland as they have negotiated, consulted, planned, and sought to understand a myriad of laws and policies enacted and pursued by government.

The laws relating to Aboriginal land rights and self-management in Queensland will be in a state of flux for some years to come. There is a need to explain the law as it presently is. Given the state of flux, there is also a need to explain how these laws have come to be, and especially to offer some reflection on the role played by Aboriginal people themselves and their supporters in pursuing legal and political reform, not always with success and not always with outcomes as reported at the time in the media. I am not an Aborigine and make no claim to speak for Aborigines. However, having been intimately involved in the political processes over a decade, I think it useful to provide an account of my perceptions of what has contributed to change and what those changes are.

Until there is significant Aboriginal representation in our political parties, in our parliaments and on our court benches, Aborigines will be left more dependent than most on public protest and media consternation in order that they might put their case. Much of their energies will continue to be dedicated to changing the terms of the debate rather than taking sides in the parliamentary chambers or in the university seminar halls. There have been times in the last decade when Aborigines have contributed significantly to Queensland legislative reform. At other times when they have failed to gain the concessions which they sought, they have usually succeeded in creating the public perception that government has not spoken the last word and that there needs to be another round of legislation or political reform so as to address their grievances.

In the last decade, the Queensland parliament has passed more laws regarding Aboriginal land title and local government than any other parliament in Australia. The Bjelke-Petersen government had no interest in describing its land title package as land rights. By the time it went out of office, it had all but delivered inalienable freehold title to three million hectares of land in Queensland. The Goss government when elected was committed to land rights but its commitment was not to any form of title which guaranteed greater control over land than that proposed earlier by the National Party government. These political realities, tempered by the

demands of an uncomprehending and emotive electorate, have made the political strategy complex not only for government but also for Aborigines in making real gains while governments in Brisbane and Canberra pursue their broader political objectives.

This book cannot be a definitive guide to the law relating to Aboriginal land and self government in Queensland. However, it seeks to provide guidance on the state of the law as at November 1991. It gives one white perspective on how these laws came to be. Even that perspective must be incomplete because I offer no analysis of the influence exerted by Torres Strait Islanders in winning concessions from the Queensland government which is the only state government which has to consider the needs of two distinct indigenous populations whose lands are included in the jurisdiction. Just as there are variations in the laws applying to Islanders as distinct from Aborigines, so too there is a difference of aspirations and political techniques between Aborigines and Islanders. Insofar as my perspective of the relations between Aborigines and government is valid, it may provide guidance and inspiration for those seeking further reform for Islanders as well as Aborigines.

Without public protest, Aborigines would not have made the gains they have in Queensland during the last decade. Without a commitment to negotiating with government in season and out of season, Aborigines would not have won the legislative concessions they have. Land rights and self-determination are as much about process as outcomes. Unless Aborigines can own the process, they will never own the outcome. During National Aborigines Week in 1991, the Victorian government handed over to the Wurundjeri people ownership of the Corranderk cemetery where their grand old lady Mrs Winnie Quagliotti was buried in 1988. Before her death she had told her people, "You know that I have some beautiful dreams. I urge you to start work on them as soon as possible. Pull yourselves together, stick together and get the job done." After the handover ceremony at which Aborigines gave the Victorian minister for Aboriginal affairs an old axe, some knives and forks, some flour and a blanket as repayment for the gifts to the Wurundjeri chiefs from John Batman when he colonised the Melbourne area, a tribal elder Mrs Dolly Nicholson said, "Today marks social justice for Wurundjeri descendants." The *Melbourne Age* celebrated the event on 6 September 1991 with a front page colour photograph and a headline: "Tribe reclaims its past as dreams

come true". Victoria has not instituted any claims process for Aboriginal land within its jurisdiction. Victorian Aborigines have title to very little land. Victorian Aborigines do not have their own community councils with power to pass by-laws and to administer their own affairs throughout the state. By 6 September 1991, Queensland Aborigines were guaranteed a legislative claims process for vacant crown land outside town and city areas within the state. They had title to three million hectares of land. Having recently knocked down the gates of Parliament House, Queensland Aborigines had little sense that they had reclaimed their past nor that any dreams had come true. Though there have been real gains during the last decade, there has always been a considerable shortfall between the gains and the aspirations. Neither the Nationals nor Labor in Queensland has given a high priority to Aboriginal participation in consultation and negotiation. The result has been an abiding mistrust of government and a scrutinising of the fine print of legislation with little incentive to celebrate the achievements of land rights Queensland style.

In Queensland, there are fifteen Torres Strait Island communities with populations from 30 to 400. There are fourteen Aboriginal communities which have some form of land title and local government; their populations vary from 150 to 2,000. According to the 1986 Census, 13,083 (21.4 per cent) of Queensland's 61,268 Aborigines and Torres Strait Islanders live in these communities. There are 3.1 million hectares of Aboriginal land. Over twenty per cent of the state's Aborigines and ten per cent of the Torres Strait Islanders live in the statistical division of Brisbane. Between the 1981 and 1986 censuses, there was a thirty-seven per cent increase in those Queenslanders who identified themselves as Aboriginal or Torres Strait Islanders. The Brisbane statistical division recorded an increase of sixty-seven per cent. Only twelve per cent of Torres Strait Islanders now live on the Torres Strait Islands away from the administrative and educational centres of Thursday Island and Bamaga. Thirty-nine per cent of Torres Strait Islanders live in states and territories outside Queensland. There has been an increasing urban drift and a greater willingness by those in urban areas to identify as Aboriginal or Islander.

No Queensland government has ever held a public inquiry of any kind into Aboriginal land rights. Since the commencement of colonisation there have always been reserves of crown land set aside for the benefit of Aborigines and Islanders. These reserves could be gazetted and de-gazetted

at will by the Governor-in-Council (effectively cabinet). In Queensland, Aboriginal reserves were under the control of the Department of Aboriginal and Islander Advancement. As in all other states, these reserves were not seen as Aboriginal land but simply crown land on which Aborigines would live until they moved to find work on cattle stations or to discover the attractions of town and city life or perhaps until they died out. If the land was required for any other purpose or if another site of greater administrative convenience could be found, people would be moved by the government despite the trauma of separating Aborigines from the last links with their land.

During the last decade, there has been wholesale law reform in Queensland relating to land rights and self-management of Aboriginal communities. Queensland Aborigines have learnt time and again that they must go it alone with no assistance from the government in Canberra whatever its political hue and whatever its promises. Until 1982, urban Aborigines and their supporters who campaigned for reform of laws relating to Aboriginal reserves were thwarted by consistent government claims that the existing laws and policies were supported by the Aboriginal leaders in the reserve communities. In July 1982 at a closed meeting at Bamaga on the tip of Cape York, that situation changed when Aboriginal reserve leaders rejected the Queensland government's proposals for Aboriginal land title. Thereafter, even the National Party had to embrace the principles, and eventually even the rhetoric, of land rights and self-management. The Bjelke-Petersen government revised its policy on land rights four times between 1982 and 1988. By the time the Nationals left office, they had granted inalienable freehold title (without mining rights) to all large Aboriginal reserve holdings in Queensland. Elected with a land rights policy, the Goss Labor government moved quickly in its second year to set up a modest claims process for Aborigines interested in vacant crown land outside towns and cities. The new government was not prepared to grant mining rights to Aboriginal landholders, except those limited rights granted by the Nationals. This book focuses on the Queensland politics of consultation processes and the Queensland laws which catalogue the outcomes which while still seen as deficient in 1991 surpass even the wildest expectations espoused by Aboriginal activists in 1981. There is something to celebrate, much to learn and more to be done.

# THE BAMAGA SHOWDOWN, 1982

## 1. Liberal/Country Party Policy and Legislation Before 1979

Since colonisation, Queensland Aborigines had lived on crown land in remote areas classed as Aboriginal reserves. These reserves would be cancelled whenever government decided that the land could be put to better use or whenever government desired to move Aborigines to another location. As recently as 1959, the Weipa reserve was reduced from 354,828 hectares to a mere 124 hectares so as to accommodate Comalco's special bauxite mining leases. Though Comalco has surrendered back over 260,000 hectares of that land to the crown it has never been re-gazetted as Aboriginal reserve. In 1963, the people living at Mapoon, to the north of Weipa, were moved to the tip of Cape York inland from the sea to a new site, ineptly chosen but aptly named New Mapoon. At the same time, people from Lockhart River were being moved to Umagico, also on the tip of Cape York. In 1965, the Aboriginals Preservation and Protection Acts 1939-1946 were replaced by the Aborigines and Torres Strait Islanders' Affairs Act which set up the Department of Aboriginal and Island Affairs as a complete and separate government department. Mr Jack Pizzey, who introduced the legislation, told parliament: "At Christmas-time (1964) I told the Director of Native Affairs and his staff that their job was to do themselves out of a job



as quickly as possible. I said, 'You have only one instruction from me - to work yourselves out of a job as quickly as you can'. I assured them I would find them other employment in the government service when that happened. There would be few departments where we would give such a charge as that."<sup>1</sup> Mr Pizzey died over twenty years ago; the department has had its fifth name change to the Department of Family Services and Aboriginal and Islander Affairs. By 1967, the department was managing not only the government reserves Cherbourg, Woorabinda, Palm Island and at Bamaga but was also now responsible for the old Anglican missions at Yarrabah, Lockhart River, Edward River and Kowanyama and the Presbyterian mission at Weipa.

The 1965 legislation was the outcome of deliberations by an advisory committee of experts and representatives of various government departments which had sought public submissions and input by an all-party group of parliamentarians who visited the Aboriginal communities. The legislation was introduced and lay on the table for three weeks before debate. In moving that the bill be read a second time, Mr Pizzey said, "I would point out that the period between the first reading and today has been prolonged to give members the opportunity of considering all aspects of this very important legislation."<sup>2</sup> During the debate, he said, "We may be able to accept some amendments from the opposition as well, because opposition members are putting a lot of thought into this matter".<sup>3</sup>

The 1965 Act was repealed and replaced in 1971 by the Aborigines Act and the Torres Strait Islanders Act. In the intervening period an Aboriginal Advisory Council (AAC) had been set up. It met first on Palm Island in 1967. The Minister, Mr Hewitt, proudly informed Parliament, "they were the first representative group of Aboriginal Australians officially called together by a government to discuss and recommend on a variety of policy issues of their own choice".<sup>4</sup> The council was constituted by the elected chairmen of all communities in Queensland. Introducing the 1971 legislation, Mr Hewitt said, "It is by the opinions and recommendations of the Advisory Council that I have largely been guided in framing the Bill".<sup>5</sup> The bill lay on the table in parliament for a week whereupon Mr Hewitt moved to debate saying, "Honourable members have now had an opportunity to study and consider" the legislation.<sup>6</sup>

In 1974, amendments to the 1971 Acts were introduced by the minister. He said, "They arise from recommendations made to me by the

advisory councils after their most recent meeting in Brisbane last week".<sup>7</sup> In 1975, the 1971 Acts were further amended by re-naming the department as the Department of Aboriginal and Islanders Advancement (DAIA). The new minister, Mr Claude Wharton, reminded "honourable members that recommendations for major amendments would, for the most part, derive from my Aboriginal and Islander advisory councils or, if not, at least be referred to them for their comment and further recommendation".<sup>8</sup>

In 1979, the Acts were further amended by legislation introduced by Mr Charles Porter who succeeded Mr Wharton. In 1978, Mr Porter had tabled in parliament a report of a commission of five Aborigines and Islanders nominated by the government "so that all should know the facts".<sup>9</sup> On 6 December 1978, Mr Porter said, "The bill will be taken only to the printing stage, so it can be on the table for the fullest consideration and discussion by all those interested until the March session".<sup>10</sup> In March 1979, Mr Porter told parliament that the AAC had met the week before and endorsed the legislation. He said, "It is their Act that we are considering here today".<sup>11</sup>

Despite sustained criticism of government policy by urban Aboriginal groups and others, the government always defended its position by claiming to act on the recommendations of the Aboriginal councils selected from the communities on the reserve areas. Those identified as troublemakers were rarely permitted to visit these communities. Troublemakers resident on the communities were expelled and forced to make their way in the cities and towns.

## **2. The Aurukun and Mornington Island Showdown**

Before the 1979 amendments were made to the Aborigines and Torres Strait Islanders Acts, the Queensland government took over the administration of the Presbyterian (Uniting Church) missions at Aurukun and Mornington Island. For three years, the Presbyterian Church had been on a collision course with the Queensland government concerning the church's administration of those mission reserves. On 16 July 1976, Mr Pat Killoran, the Director of the Department of Aboriginal and Islander Advancement, had written to church authorities "concerning some disquieting information conveyed ... in connection with what is described as an

Aurukun decentralisation programme apparently being fostered at Aurukun". In his characteristic style, he wrote: "This strategy appears closely similar to the 'Land Rights' philosophies conceived through a Commission given Mr Justice Woodward. If contrary to Queensland Government policy, such a programme is being developed, radiating from Aurukun the advocacy of traditional land settlement, then immediate action should be taken to conform with Queensland policy and familiarise the Aboriginal Council and people as to the illegality and social inadvisability of the decentralisation proposals." These views were then expressed with the use of a broader and more public brush when the director presented his annual report to parliament in October that year. He said in the introduction to his report:

It is unfortunate to note that the zeal for pastoral care has, in many instances, been replaced by a philosophy of materialism and political bias. The result is proof of the simple statement that "man does not live by bread alone", and this is instanced by a marked decline in the moral and physical standards of some communities.

Community residents have been left without spiritual resorts and guidance that is a basic necessity for any human beings.

At the same time the Aboriginal community is seen as a fertile field for social experimentation and investigation that would not be tolerated by any other sector of the population, and it is a pity that many of those involved do not consider they are dealing with people who are immensely sensitive and require the advantages of stability and time rather than the status of social "guinea pigs".

In 1978, the Queensland government decided to take over the management of Aurukun and Mornington Island. So as to avoid the possible operation of federal legislation which allowed for a self-management scheme on reserves, the Governor-in-Council sat in the middle of the night and de-gazetted these reserves leaving it to parliament to resurrect them some days later as shires. The Local Government (Aboriginal Lands) Act 1978 constituted Aurukun and Mornington Island as shires and, subject to some special provisions, applied the Local Government Act to their shire councils. The councils were granted a fifty year renewable lease over the community lands. Each council was provided

with the services of a Co-ordinating and Advisory Committee constituted by representatives of the federal and state ministers. These committees had only advisory and assisting capacities in law. They had no power to veto council expenditure or policy decisions. The Aurukun and Mornington Island communities were given some, but limited, fishing, hunting, foraging, timber and quarry rights as well as the right to negotiate mining agreements with provision for a share in profits.

During the Commonwealth-State stand-off over Aurukun and Mornington Island, the Fraser government had parliament pass the Aboriginal and Torres Strait Islanders (Queensland Reserves and Communities Self-Management) Act 1978. Under the Act, the council or residents of a reserve could request self-management from the Commonwealth and the minister could make a declaration. The Queensland government easily circumvented this legislation by changing the two communities involved from reserves to shires.

Though the Commonwealth's law was rendered a dead letter for Aurukun's and Mornington Island's purposes, it remained on the books and available for implementation on other Queensland communities which continued as reserves. Relying on this Act, the Yarrabah community near Cairns made several requests to the Commonwealth government for land rights and self-management, commencing with a petition on 30 January 1979. The Commonwealth did not accede to that request nor those made by other Queensland communities including Cherbourg, Kowanyama, and Woorabinda.<sup>12</sup>

The Queensland government's policy and conduct attracted much criticism at this time. Answering the criticism, the Premier, Mr Joh Bjelke-Petersen, made clear his government's policy:

Territorial acquisition en masse for Aborigines as a race in isolation stands in sharp contrast to the policy of Queensland where land rights are exactly the same for Aborigines and non Aborigines. Any Aborigine can hold the various tenures available as many do, under the same legal rules and procedures which apply to everyone else.

I want to make it very clear to you that whilst in Queensland ethnic background is no disqualification from equal opportunity neither is it a qualification for privileged consideration over other citizens.

It can only be illusory to believe that by giving one group rights in land beyond those available to other citizens, social and racial unity will remain stable. On the contrary, occurrences in the Northern Territory flowing from land rights legislation, which I believe was carelessly introduced to that part of Australia by the Commonwealth Government, reflect quite clearly an extremely fragile and tense human relations situation.<sup>13</sup>

His Government was very opposed to outstations and therefore would not countenance any proposals which would give that option to the people or mission administrators. He said:

My own concept of social alienation can be illustrated by actions of the Uniting Church in establishing "outstations" many miles from conventional facilities such as hospital, schools, etc, where reversion to the "tribal" pattern of life was encouraged.

School attendances dropped 40% and we cannot accept or tolerate a situation in this State where the young people of a Community are thrust into an isolated situation where, by denial of fundamental education and health care services, and by an ideological indoctrination of Aboriginal separation and separate development, they would, by contrast with all other Queenslanders, be seriously impaired in choosing to pursue broader horizons of life in the future should they wish to do so. That Aborigines may be socially and educationally equipped to make such a choice in life is the fundamental aim of our Aboriginal Advancement policy.<sup>14</sup>

On 15 May 1980, Senator Fred Chaney, Liberal Minister for Aboriginal Affairs, told the Senate: "The main difference between the two governments is the rate at which the Queensland government is moving towards the goal of self-management. In this respect Queensland has moved more slowly than the other States. There is no similar coincidence between the policy views of the two governments on the question of land rights. The Queensland government has stated that its reserves are held in trust while a need for them exists for use by Aborigines and Islanders, with the Director of the Department of Aboriginal and Islander Advancement serving as trustee."<sup>15</sup> Despite Commonwealth pressure, the Queensland government indicated that it did not favour adoption of the Aurukun

model by issuing a lease to the Yarrabah Council covering the whole area of the reserve.

### **3. Promises and Preparation for Change**

In October 1980 the premier announced that the Aborigines Act and the Torres Strait Islanders Act would be repealed. On 18 March 1981, he told Parliament, "It will be done in the near future; during the year; perhaps not this session but next session. I can promise that. That will be for sure".<sup>16</sup> On 1 April 1981, the premier told the AAC that "he hoped that it would be possible to introduce amending legislation later this year and suggested that council might form a small working group. He stressed also that before any draft legislation went to parliament, it would have to come back before the Advisory Council".<sup>17</sup>

On 20 July 1981, the leaders of the three major churches, Archbishop Francis Rush (Catholic Archbishop of Brisbane), Archbishop John Grindrod (Anglican Archbishop of Brisbane), and Reverend Duncan Harrison (Moderator of the Uniting Church in Queensland) met with the Queensland premier to express concern that the people, both Aboriginal and white, were anxious about the uncertainty surrounding the Government's proposal to repeal the Aborigines and Torres Strait Islanders Acts. To clarify what was determined at the meeting, the heads of churches issued a statement the next day calling for consultation, self-management by communities and security of tenure. They said:

The Premier has now stated the Government's position more fully. It will be possible for future discussions to be based upon the Government's expressed intention, and not on conjecture as in the past. We do not presume to pass judgement on the Government's plan. We believe that no one is in a position to do that until the views of the Aboriginal people have been heard.

We told the Premier we were concerned about the following matters:

1. the need for consultation which is widespread, lengthy, and in conformity with the particular character of the Aboriginal people. We made the recommendation that submissions might be invited also from Aboriginal people who are no longer on reserves and from individuals and groups within the community who have a sincere interest in the welfare of the Aboriginal people. Indeed, the need for consultation with the Aboriginal people was the

point to which we gave greatest emphasis in our conversations with the Premier.

2. the responsibility that the Aboriginal people should have for managing their own affairs.

3. the need for secure tenure of land.

In a letter to the Premier, written immediately after the interview, we expressed the hope that a question of such magnitude would go beyond party politics and that all parties would co-operate to achieve what is best for the Aboriginal people. It is the Aboriginal people who must be the first consideration.

The World Council of Churches had sent a team of five members to visit Aborigines a month earlier. Their east coast team visited Queensland from 25 June to 29 June 1981. The Australian Council of Churches published the WCC's controversial report *Justice for Aboriginal Australians* on 10 August 1981. They urged "that the Queensland Government state publicly, and at least 6 weeks prior to taking action (so as to enable sufficient public debate), their plans and intentions for the Aboriginal and Torres Strait Island people of Queensland when the Aborigines Act 1971 and Torres Strait Islanders Act 1971 are repealed".<sup>18</sup> The report prompted a twenty page reply by way of ministerial statement to parliament by Mr Ken Tomkins, then Minister for Water Resources and Aboriginal and Island Affairs, which he concluded by asking the Australian churches to become involved to halt the trend to confrontation and division in race relations. He said, "I ask them to do so on the basis of reason, knowledge and Christian principles. Australians must re-define new moral values based on racial equality and understanding, a process which governments are ill-suited to implement, and in which they should have limited jurisdiction". He said it was "now for the Australian people and churches to decide the basis upon which future generations will come to regard one another". He then wrote a letter to every clergyman in the state saying, "Hence I would welcome the churches, as moral and ethical authorities in Australian society, to consider their role. Naturally this is a matter for the churches to determine".<sup>19</sup> Government had thrown down the gauntlet to local churches to put up or shut up.

Meanwhile, the premier had told the AAC that "their views would be very carefully taken into account".<sup>20</sup> Then on 16 September 1981, he told

Parliament that he would not set up an all-party committee to consider the legislation and that any decisions taken by the government would "be in the best interests of the people concerned".<sup>21</sup> Thus Mr Pizzey's 1965 precedent was rejected out of hand. On the same day, the Queensland Minister for Aboriginal and Island Affairs replied to a letter claiming that Queensland communities "have expressed the wish for full freehold title of the lands, self-management and ownership of minerals". He said, "I am unaware of any such expression by the elected representatives of Queensland's Aboriginal reserve residents and indeed the contrary has been indicated to me personally by the majority of these same representatives. As I have a close relationship with these people in my capacity as a Minister of the Crown, and am confident they truly and by democratic process represent their communities of origin, I cannot endorse your beliefs."<sup>22</sup> The government was then considering the possibility of granting fixed term leases to other Aboriginal communities. The rationale for this approach was to be continually restated in succeeding years as increasingly complex amendments were made to the Land Act to provide a suitable form of inalienable title under existing forms of land tenure. Mr Tomkins put it this way: "I am of the opinion that of the forms of land tenure currently existant, and again in view of the need not to create legal separations of indigenous people thereby causing separate development, a form of leasehold arrangement offers significant advantages over the often advocated and frequently misunderstood freehold title. These advantages exist for both the communities concerned and the public interest."<sup>23</sup>

Late in 1981, the department issued a special edition of the DAIA News entitled "A Time for Thought Not Worry". That issue presented nine commitments by the premier and the minister, Mr Tomkins. One of those commitments was: "Before any draft legislation goes before Parliament it will go before the Advisory Council for discussion. The Councils will have the opportunity to review proposed legislation."<sup>24</sup> On 11 November 1981, Mr Tomkins told parliament that the advisory councils were "the councils from which the Government seeks advice".<sup>25</sup>

#### **4. The First Land Offer**

Brisbane was host for the Commonwealth Games in 1982. On 1 March 1982, the premier and his deputy, Dr Llew Edwards, announced cabinet's decision



to grant Aboriginal and Island communities deeds of grant in trust "under existing provisions of the Land Act". Cabinet had endorsed proposals to abolish Aboriginal and Islander community reserves throughout the state and transfer title of the reserve land to elected local councils of Aboriginal and Torres Strait Islander people. Title to the lands was to be vested in the elected councils through Deeds of Grant in Trust (DOGITs) under existing provisions of the Land Act. The DOGIT would carry "ongoing title under existing terms in the Act". They went to great pains to point out that there would be no special legislative recognition of Aboriginal land title. The DOGIT would be "the traditional Deed of Grant granted under the Land Act and enrolled in the Real Property Office". The local councils, holding the land in trust, were to have the power to lease the land to resident individuals or other legal entities of resident individuals with the approval of the Minister for Lands. This power was to be no different from that exercisable by other Queenslanders holding similar titles under the Land Act.

The proposals adopted by cabinet were recommended by a ministerial committee comprising the premier, the deputy premier and the minister for Aboriginal and Island affairs, Mr Tomkins. The security of tenure and integrity of the reserve land were said to be "in keeping with the wishes of the Aboriginal and Torres Strait Islander Advisory Councils, the Chairmen of which have been consulted and are generally in agreement that the tenure reflects the wishes of the people resident on the reserves".

The premier and Dr Edwards said the objective of cabinet's decision was to encourage local inhabitants to assume an increasing role and responsibility in the development of townships, lands, enterprises and cultural activities within the relevant council areas. The councils were to be charged with the good rule and government of the lands held in trust. People resident on the areas as citizens of Queensland would continue to have the same rights and responsibilities as every other Queensland citizen. All government services and facilities being provided would be maintained. Councils were guaranteed management roles, including the making and enforcing of by-laws, the determination of entry and residence requirements and decisions on availability of alcohol.

There would be provision for the elected chairmen of the community councils to continue their roles on the existing Aboriginal and Torres Strait Islander advisory councils, established to present a common voice to the

state government on matters of mutual interest. There would also be provision for the continued role of Aboriginal courts and Island courts to administer justice under by-laws with provisions for appeal to mainstream Queensland courts. All minerals would remain reserved to the crown. The premier and his deputy mistakenly claimed this was the case for all lands throughout the state.

Mr Bjelke-Petersen and Dr Edwards said that, as in the past, indigenous people could choose to live in the former reserve communities or move elsewhere if they so wished. The boundaries of the DOGITs would conform with the existing Aboriginal and Islander community reserve areas. Public assets, such as hospitals, police stations, schools and other public buildings would be excluded and would remain reserves for these purposes as in other towns and cities.

Mr Bjelke-Petersen and Dr Edwards said the proposed changes "would give every Aboriginal and Torres Strait Islander citizen the encouragement and opportunity to develop personal capabilities and participate on an equal footing with every other fellow Queenslanders." The DAIA was to be maintained. It would become a servicing facility to ensure maximum support services were available to each of the elected community councils.

Cabinet authorised the drafting of necessary legislation which would include the repeal of the Aborigines Act 1971-1979 and the Torres Strait Islander Act 1971-1979. The premier guaranteed that continuing consultation with the Aboriginal and Torres Strait Islander advisory councils would take place during the preparation of the legislation.

Federal cabinet was meeting in Brisbane that week. The day after the premier's announcement, it was endorsed by the Prime Minister, Mr Malcolm Fraser. Senator Peter Baume, the federal minister for Aboriginal affairs, was known to have some reservations. Baume met with the Queensland branch of the National Aboriginal Conference (NAC) two days after the premier's announcement. He saw the Queensland proposals as an advance on fifty year leases because the "Queensland government had indicated its willingness to pass ongoing, permanent title to Aboriginal communities". He said "title would be forever". Admitting that "the Land Act had a provision that the trust could be rescinded by the Governor in Council", he said this was "an obscure part of the Land Act" and he did "not believe it would be used or could be used in political terms". He thought it may be possible to strengthen the legislative provisions by making the

power to revoke subject to parliamentary review as "This would make any such action a matter of public debate."

Aware of Aboriginal demands for inalienable freehold title, Senator Baume said, "The only way to get special freehold that could never be sold was by a special Act of the Queensland Parliament. When it became clear that that would not be done, there was a need to look at ways to get ongoing tenure under the existing law."<sup>26</sup> The Commonwealth government accepted the impossibility of Queensland passing special legislation for Aboriginal land title. They worked with their Liberal colleagues in Queensland to require parliamentary review of any order of the Governor-in-Council rescinding Aboriginal land title.

As advisor to the Queensland Catholic bishops, I published an analysis of the Queensland governments' proposal on 4 March 1982. I listed the incidences of and restrictions on the proposed title "if there be no amendments to the Land Act". They were:

- \* The deeds of grant in trust may be granted by Governor-in-Council for any public purpose (s.334(1)).
- \* A public purpose covers all manner of things from aerodromes to cemeteries and includes Aboriginal reserves (s.5).
- \* The trustees (in this case, the councils) are liable to pay any survey fees (s.334 (2)).
- \* The Governor-in-Council (effectively cabinet) may cancel or vary the deed of grant at any time (s.334 (4)).
- \* The Governor-in-Council may declare the land to revert to the crown for any reason that it appears desirable to do so (s.353 (1)).
- \* The Governor-in-Council (cabinet) may remove any trustee (councillor) from office if it is of the opinion that it is "in the public interests" and in its absolute discretion may appoint new trustees (councillors) (s.340 (3)).
- \* The trustees' (councils') books of account must be open and available at all times to the Minister for Lands (s.341 (1)).
- \* The trustees (council) have power to surrender the land back to the crown. (s.342).
- \* The trustees (council) could lease blocks of land to particular families only if the Minister for Lands gave written approval (s.343 (1)). The Minister may, in his absolute discretion, refuse such approval (s.343 (3)).
- \* The trustees (council) leasing houses or land to families must charge the highest rent which can reasonably be obtained (s.344).

- \* A lessee (family in possession of a house) could enter into a mortgage only with the written consent of the Minister for Lands (s. 347 (1)).
- \* The Minister for Lands (and not just the trustees) may cancel any lease if he is satisfied its conditions are not being met (s.348). Any person whose lease is so cancelled is not entitled to any compensation for any improvements made to the land by him.
- \* The police are empowered to remove any person whose lease has been terminated by the Minister for Lands (s.373 (1)).
- \* The trustees (council) may not allow any person to occupy any land on a reserve for more than a month without the prior consent in writing of the Minister for Lands (s.350).
  - \* If the trustees (council) be in default of mortgage payments relating to reserve land, the land may be sold by the mortgagee (s.351).
- \* The Land Court may hear an application by the Minister for Lands if he be of the view that the area of any reserve land exceeds that reasonably required for residence and the court is able to excise any excess from the deed of grant (s.252).
- \* The Governor-in-Council may resume any land needed for public purposes including airstrips, scenic purposes, camping places, departmental purposes, experimental farms, pasture reserves, and quarries (s.358).
- \* It would not be necessary for a person desirous of entering trust land for mining or prospecting purposes to make application to the mining warden or to obtain consent of the trustees. The Governor-in-Council would be free to give permission for such entry (Mining Acts ss. 44 and 118).
- \* The trustees and occupiers would not enjoy any timber or quarry rights.

The Catholic and Anglican bishops of Queensland gathered for their annual one day meeting on 5 March 1982 and published this statement on 8 March 1982:

We, the Anglican and Roman Catholic Bishops of Queensland, met in annual conference last Friday. Among other matters, we discussed the announcement concerning the transfer of title of Aboriginal and Torres Strait Islander Reserve lands to the respective Community Councils.

Like many in the community, we are asking what security is offered to the Councils and residents of those reserves.

Our hope is that the security offered will be guaranteed by Act of Parliament.

The proposed use of "Deeds of Grant in Trust under existing provisions of the Land Act" would not seem to be sufficient to provide adequate security of title. If Deeds of Grant in Trust are appropriate legal devices for the transfer of title (and that is for others, expert in the law, to determine), they should surely be created so that they might never be varied or terminated except by Act of Parliament.

Otherwise, would not the tenure for those living on the reserves remain as at present, that is, subject simply to the Queensland Government's discretion?

We note in the Press Release the Government's assurance that consultation has taken place. We should like to renew the appeal made by the Moderator of the Uniting Church and our two Archbishops in July last year that such consultation should be "widespread, lengthy, and in conformity with the particular character of the Aboriginal people".

We hope that the tenure bestowed will give the State's Aborigines and Torres Strait Islanders all the security and powers they need to choose between life on their lands of historical significance and life in the cities and towns.

The same tenure needs to be assured to thousands of other Aborigines and Torres Strait Islanders living on Country Reserves. This emphasises the need for the widest possible consultation.

It is our hope, therefore, that the Queensland Government will legislate in Parliament for security of tenure after due consultation with the people on the reserves and their elected representatives, and after concerned community groups have had an opportunity to scrutinise the proposed laws.

## **5. The Second Land Offer**

The following weekend, Bjelke-Petersen clashed with Sir Robert Sparkes, the National Party president at a party meeting in Rockhampton. Sparkes wanted the Land Act amended to specify conditions which would justify the revocation of a deed. The Prime Minister, Mr Fraser, was reported to have asked that the power of revocation "rest only with State Parliament". The Premier thought Sparkes' idea had echoed Fraser's view and said, "But Queensland has made a decision. I said I would not agree. I said I would not implement this policy on land rights because we, the government joint parties, have taken our decision. I said my piece and Sir Robert said his. I left the meeting."<sup>27</sup>

During the next week, there were continued discussions until Thursday 18 March when the government joint parties decided to amend the Land Act so that any revocation would have to be tabled in parliament within 14 sitting days. The Liberal Leader and Deputy Premier, Dr Edwards said this new concept of land tenure would "guarantee Aboriginal communities a deed of grant in trust and for the residents to be given tenure of their land and housing, community councils will have management of the land and they will be trustees of it for all time."<sup>28</sup> He said the change would satisfy Canberra and the churches. There was said to be a change from revocation resting entirely with the Executive Council to revocation tempered by provision for parliamentary review. Senator Baume replied to the Queensland bishops: "The Commonwealth recognizes that there are some provisions in the existing law relating to grants of deed in trust in Queensland which, if literally and strictly applied, might disadvantage some Aboriginal reserve residents. The literal provisions of the law should be seen in the light of the commitments announced by the premier and deputy premier. Nevertheless I feel that the power of revocation of grants in trust (section 353 of the Land Act) might be tempered by provision for parliamentary review of any such action. That would meet your own desire to see that tenure ought to be guaranteed by parliamentary oversight."<sup>29</sup> The Catholic and Anglican archbishops wrote immediately to Dr Edwards and Senator Baume saying: "We cannot agree that the tempering of the power of revocation of Deeds of Grant in Trust by parliamentary review would satisfy the view that we and the other bishops of Queensland expressed in our letter of 8th March that Deeds of Grant in Trust 'should surely be created so that they might never be varied or terminated except by Act of Parliament'."

I then published an analysis of the new proposal highlighting the defects of the tabling procedure for disallowance. Many Queensland statutes enacted by 1982 provided that not only regulations but also Orders in Council arising out of such Acts had to be tabled in parliament and made available for parliamentary scrutiny (e.g Agricultural Bank (Loans) Act 1959-1979, s.25). Usually an Order in Council would take effect on the day of publication. It would then be laid on the table in parliament within fourteen days if parliament were sitting, or if parliament were in recess (which at times it is for some months), it would be laid on the table within fourteen days of re-commencement of parliament. However the Order in

Council would continue to operate during this time. After tabling, Parliament could pass a resolution within another fourteen days disallowing the order. The order would continue to operate until such disallowance.

When tabled, an Order in Council would be studied by the parliament's Committee of Subordinate Legislation. This committee had no power to disallow an order itself but it could report to parliament recommending disallowance. The supervisory role played by this committee was restricted by many factors including:

1. An order which was effective from the date of publication could have been in operation for many months before it was considered by the committee. For example, an order for the revocation of a reserve could be made at the beginning of a parliamentary recess and be implemented months before parliament reconvened to consider the order. The bulldozers could have come and gone.

2. The committee had to be newly constituted at the beginning of each session. If that did not occur on the first sitting day (as it need not have; for example when parliament re-commenced on 7 August 1979, the committee was not reappointed until 6 September 1979), the committee would have less than fourteen sitting days to scrutinise an order.

3. At the beginning of each parliamentary session, many pieces of subordinate legislation could be tabled all requiring scrutiny within fourteen days or less (for example, 208 instruments of subordinate legislation were tabled in the first two days of the August 1979 session).

4. Though legislation directed the tabling of an Order in Council, there had been instances when an order had not been laid before parliament in accordance with the statutory requirements. Such failure was thought not to nullify the order but simply to free it from full parliamentary scrutiny.

While any member could move for disallowance of a tabled order whether or not the committee had addressed itself to the order, under the standing orders, debate on a motion to disallow an order was restricted to a maximum of forty-five minutes before the minister had the right of reply and the vote had then to be put. Plainly, this procedure did not provide the security necessary to protect reserve residents from revocation by a government which might wish to close a reserve, vary its boundaries, or change its purpose, without reason or explanation at the time. Especially

during lengthy parliamentary recesses, it would provide little protection at all.

If security were to be guaranteed by Act of parliament, title could be taken away only by parliament when parliament was sitting and only after debate at all stages of passage of any bill. Neither the premier nor the deputy premier explained why security could not be guaranteed by Act of parliament. If such security were not to be given, and without reason, no semblance of security could be given by a parliamentary disallowance provision unless:

1. all orders revoking or varying any deeds of grant were required to be tabled;

2. provision was made nullifying any order which was not duly tabled;

3. it was specified that all such orders were not to come into effect until the time for parliamentary disallowance had elapsed;

4. provision was made for tabling a copy of a report relating to the proposed revocation or variation by the relevant Advisory Council (Aboriginal or Torres Strait Islander);

5. provision was made enabling the Committee of Subordinate Legislation to exist and function for the duration of the parliament;

6. the time for debate on a motion to disallow was markedly increased to allow the canvassing of the many issues pertinent to any attempted closure of or change to reserves.

The question still remained: why not give security of tenure guaranteed by Act of Parliament? To plug the gaps in the parliamentary disallowance provisions, I proposed this amendment:

Every Order in Council made under this section shall:

- a) be conclusive evidence of the matters contained therein;
- b) be published in the Gazette
- c) be laid before the Legislative Assembly within fourteen sitting days after its publication in the Gazette.

If the Legislative Assembly passes a resolution of which notice has been given at any time within eighteen sitting days after the Order in Council has been laid before it disallowing the order, the order shall be deemed a nullity.

Every Order in Council made under this section shall take effect only if it has been duly tabled and shall take effect from the date specified therein



provided that such date is not prior to the nineteenth sitting day after the Order in Council has been laid before the Legislative Assembly.

The Government made no response. The DOGIT legislation was introduced to parliament on 25 March 1982 and passed on 31 March 1982 without any reference to the AAC which had last met in August 1981. The government earlier admitted that it had consulted only with the Advisory Council's chairman, Mr Les Stewart MBE. He and the chairman of the Island Advisory Council were said to be "generally in agreement that the tenure reflects the wishes of the people".<sup>30</sup>

Introducing the bill to parliament, Mr Tomkins explained the policy change from deeds of grant under existing provisions of the Land Act as announced by the premier on 1 March 1982 to deeds of grant governed by terms set down by the joint parties meeting of the coalition partners on 18 March 1982: "The elected Aboriginal and Islander councils will hold title to the present community reserve lands through what is called a deed of grant in trust under the existing Land Act provisions, as modified to meet the circumstances."<sup>31</sup>

After both the Commonwealth and State governments had attempted to console the church leaders that a parliamentary disallowance clause would meet their concerns, the churchmen saw no option but to seek the opinion of a leading barrister, Mr C.W. Pincus QC, President of the Queensland Bar, who concluded, "If there was a genuine intention of giving security of tenure, it is manifest that that intention has by no means been achieved in the Bill placed before me".<sup>32</sup> Publishing the opinion on 30 March 1982, the day before the parliamentary debate, the church leaders said:

Like everybody in Queensland, we have heard the plea of Aboriginal and Islander reserve residents for security of their reserve lands. Like many, we asked that secure title be given in such a way that it might never be varied or terminated except by Act of Parliament.

In recent weeks, there has been much public debate and considerable confusion over this issue. The question remains: What security is to be given?

We do not have the legal knowledge necessary to give an adequate answer. We here produce the opinion of leading Queen's Counsel whom we asked to answer that question. With regret we note counsel's opinion: " My response ... is that no security is offered."

We hope that whatever legislation is passed will give our reserve residents stability on their lands of historical significance.

The legislation was passed without amendment.

## **6. The Smokescreen**

The day after the land legislation was passed, the premier made a ministerial statement to parliament explaining why security of tenure was not to be given. Describing the land rights movement as radical, he claimed its objective was "to create a separate black nation, outside the laws of Australia, capable of contracting with overseas nations hostile to Australia in the future." He disclosed details "of a communist long range plan to alienate Aboriginal lands from the Australian nation so that a fragmented north could be used for subversive activities by other countries".<sup>33</sup>

Next sitting day, the premier, answering a Dorothy Dix question, told parliament: "Church leaders are expressing their views on Aboriginal land rights and on ways of helping the Aborigines. I suggest that the churches play the role that they are designed to play, namely, preach the gospel and become involved in the management of Aboriginal communities. They should send church workers and missionaries to the reserves, as they did in the early days. That is the job that the churches should be doing. I regret to say that the churches are not becoming involved in that aspect of their work, nor are they participating in the management of reserves to any great extent. The government has always encouraged the churches to stay and work on the various reserves and missions."<sup>34</sup>

Necessary amendments to the legislation were not to come until December 1983. During the six weeks of controversy about these technical legal amendments, the Queensland government succeeded in setting up a sensational smoke screen. A week after his announcement of proposals for new Aboriginal legislation, the premier and his police minister fuelled speculation about "a secret black army... in training specifically to provoke violence in Brisbane during the Games".<sup>35</sup> The premier alleged that six Aborigines were at that time in Libya undergoing guerilla and terrorist training. The Police Minister, Mr Russ Hinze, told parliament: "A document was presented to me by the police commissioner. Being a responsible minister, I conveyed the information to the premier... It is his

duty as premier to convey the information, which has international overtones, to the prime minister. That was done. As to tabling the document - if the premier wishes to do that, he may do so; it is entirely up to him."<sup>36</sup>

Though it was claimed that the information had been handed on to the Commonwealth government, the premier never tabled the police commissioner's document. Aboriginal Senator Neville Bonner placed a question on notice in the Senate for reply by the Minister for Foreign Affairs. Meanwhile, the Land Act amendments were introduced and passed amidst press speculation about Aboriginal terrorism. It was not until 20 April 1982 that Mr Andrew Peacock, the Minister for Foreign Affairs provided his answer in the Commonwealth parliament: "I am advised that inquiries conducted by my department and other relevant authorities have produced no evidence to verify that Aboriginals are currently undergoing guerilla or terrorist training in Libya."<sup>37</sup> Senator Baume, Commonwealth Minister for Aboriginal Affairs, went further and told the Senate: "That whole story is quite fanciful. It may be that a premier receives from one source or another information that may eventually prove to be false."<sup>38</sup> But the damage had been done by Queensland ministers of the crown at the time parliament was to consider land legislation for the benefit of Aboriginal people.

## **7. The Commonwealth's Assurances**

Appreciating and acknowledging the defects in the Queensland legislation, the Commonwealth government, anxious to resolve the Queensland land rights issue before the Commonwealth Games, issued what became known as the Baume guarantee. Senator Baume admitted that the Commonwealth government had reservations about the Queensland legislation and was particularly concerned that land could be resumed before the parliament had a chance to exercise its judgment. He gave an unequivocal guarantee that the Commonwealth would act to remedy any transgressions of the principles of security of tenure and integrity of reserve boundaries. Reserve residents were to rely upon the State government's goodwill and the Commonwealth government's determination to see principle maintained; they were not to be given assurance by force of law. Such reliance is not easy when goodwill and determination by government should result in

legislation guaranteeing the security promised but not forthcoming. On 20 April 1982, Senator Baume told the Senate:

The Commonwealth believes that the Queensland government has acted in good faith in the changes it has made to the Lands Acts. The Commonwealth still has some reservations, particularly about the possible resumption of land which might occur during a parliamentary recess or before the parliament had a chance to exercise its judgement. It is because of those concerns that the Commonwealth has backed up Queensland's action with its own unequivocal guarantee. I remind honourable senators that the Commonwealth has given an unequivocal guarantee that it will stand behind the stated intent of the Queensland government to provide security of tenure and integrity to the reserve land. It has given an unequivocal guarantee that if actions transgressed these principles or indicated an unreasonable use of the discretions available under the legislation, the Commonwealth would act accordingly.

I put it to the Senate that one has to consider the amendments which have been made, the amendments which have yet to be produced and our guarantee, if one is to look at the package as a whole. It is one thing to look at the worst possible scenario one could draw on a legal analysis of document; it is another to look at that law and combine it with the Commonwealth's guarantee and some appreciation of the political realities applying in Australia in 1982.<sup>39</sup>

The Fraser government had committed itself to four principles: the integrity of the present reserve boundaries be maintained; secure tenure for occupants and the preservation of their rights to use of their land; local communities to play a significant role in the management of the reserves; and full consultation with Aboriginal and Torres Strait Island people before any decisions are made. On 4 May 1982, Senator Baume told the Senate: "We will ensure that for the reserve communities the fine print is in accord with what we have promised. The guarantee ... applies just as much to the fine print of these grants as it does to the emergence of new legislation and legislation already passed."<sup>40</sup>

With the Commonwealth Games on the horizon, Commonwealth officials made frequent visits to Brisbane attempting to hose down the prospect of any conflict. Charles Perkins and John Taylor, then Secretary of the Department of Aboriginal Affairs, met with church leaders on 4 May

1982. Their position was well summed up in an article "By a Special Correspondent" appearing in the *Canberra Times* under the headline "Much has been achieved, if you look behind the rhetoric". The correspondent (who happened to be Taylor) surmised: "A visitor from, say, Africa would be forgiven for wondering precisely what it is we are all up to with respect to Queensland Aboriginal land" and continued:

Your correspondent could find no simple answer. An important element appears to be a deep distrust of the intentions of the Queensland government. As a result, the literal interpretation of any Queensland legislation is closely examined and the worst possible option seen as the inevitable choice by Queensland where any discretion is open to it.

So, if the legislation allows a ministerial veto, it is automatically assumed by those who do not trust the Queensland government, that the veto will be exercised in a way deleterious to the interests of the Aboriginal people - and at the earliest opportunity. If there is a way under which Aboriginal land could be taken away, then it is automatically assumed that that is what will inevitably happen.

Now, it should be freely said that the land tenure provision enacted in the Queensland parliament recently, under which the existing inhabited reserves would be granted to the Aboriginal people, provides a number of classically Queensland loopholes. As has been pointed out by a legal adviser to the Queensland bishops, the land is not legally secure. But then, no land in Queensland is absolutely secure - in fact, it seems easier to take back freehold under Queensland law (provided the Government is prepared to pay), than to take back Queensland Aboriginal land.<sup>41</sup>

He concluded with the challenge which had earlier been put to church leaders:

Some people are gambling on forcing the Queensland government to match in law what it says it is prepared to do in practice. It has said that it will maintain the security and integrity of the Aboriginal lands for as long as the Aboriginal people want that to be the situation, but it has left legal loopholes.

Why won't the Queensland government omit the loopholes? It could have something to do with constituencies, fear of a backlash, past public positions.

What seems clear is that it won't back down now, regardless (or because) of threats. Will this attitude remain for all time? Hardly, given the party policies, provided the growing goodwill is not extinguished.

Therein lies the rub. Reconciliation, and not confrontation, is desirable if existing gains are to be retained and built upon.

Supporters of the Aboriginal cause have a difficult decision. Do they risk present (and future) gains or do they consolidate them?

Once you look under the rhetoric, much has been achieved - we now need someone in an independent position to give leadership so as to bind Queenslanders together, not drive them apart.

Like the Queensland government, the Commonwealth officials were blind to the churches' position that to seek the assurance of law is not necessarily to question the goodwill of government. Meanwhile to withhold such assurance regarding land title without cause is to undermine the law and the process of government. The breakthrough had been made in having the Queensland government change its policy and accept the need for substantive changes to the existing provisions of the Land Act. All that remained was to review the proposed amendments on their merits and insist on legal security of tenure. But for Aboriginal awareness of the legal effects of the initial Queensland proposals and the churches' insistence on reform, there would have been no amendments whatever. The Queensland premier had appeared on television a week before the media release of 1 March 1982 saying, "I mentioned it to the prime minister and he said, 'That suits us. That sounds pretty good'."<sup>42</sup> Questioned in parliament about this, Mr Fraser had replied: "The Minister for Aboriginal Affairs has advised me on a number of occasions that the proposals of the Queensland government seem to be acceptable against the principles that the minister has enunciated on a number of occasions".<sup>43</sup> Even in amended form, they were not. That is why Senator Baume had to restate the Baume guarantee on 1 April 1982.

To assure peace at the Commonwealth Games, the Commonwealth had no muscle to force legislative change but saw its role as convincing Queensland citizens to trust the goodwill of the Queensland government. The clearest and simplest indicator of such goodwill would have been reasoned discussion and enactment of suitable land title. That was not to come until after the Commonwealth Games.

## **8. The Bamaga Meeting**

On Wednesday, 30 June 1982, the Commonwealth was informed by the Queensland government that there were, as yet no draft proposals in existence for services legislation. The Commonwealth relayed that information to church leaders next morning. That afternoon, Dr Edwards stated that nothing had yet been put to the cabinet sub-committee charged with devising the services legislation. Dr Edwards said he was hopeful that something in the nature of a white paper outlining principles for services legislation might be circulated prior to the Commonwealth Games and that any draft legislation would not go to parliament until November. He was anxious that between July and November, members of the sub-committee might have the opportunity to consult at some length with reserve residents on their reserves. He proposed that any draft legislation should be laid on the table until March 1983 to allow full public scrutiny before passage.

On 5 July 1982, a meeting, attended by officers from DAIA and sixty-four Aboriginal and Islander representatives commenced at Bamaga on Cape York. That meeting was not convened, sponsored or requested by the cabinet sub-committee. It was a regular meeting of the Aboriginal and Islander Advisory Councils being run in conjunction with an education seminar. Commonwealth officials were not permitted to attend. Mr Pat Killoran, the Director of DAIA, said it would be inappropriate for church representatives or leaders to attend the meeting. The churches were concerned by press reports that the meeting had been called by the State government and that Aboriginal leaders would discuss "a draft of proposals to parliament on services legislation" which was "now being finalised".

Mr Tomkins criticised the Australian Council of Churches which had called for the Queensland government to show good faith by meeting and discussing its proposed services legislation with Aboriginal communities before the Commonwealth Games. He said: "They are clearly out of touch with the situation. Consultation with Aborigines and Islanders has been the keynote of our approach to the new legislation. We began these meetings a year ago, but the Australian Council of Churches apparently either doesn't know this, or doesn't want to recognise the fact."<sup>44</sup> On the same day, the Acting Premier, Dr Llew Edwards, who said he was chairing the cabinet subcommittee on the legislation, wrote to Archbishop Rush. The courier-

delivered letter stated: "At this stage, Cabinet has made no decision nor, in fact, has it had any consideration of the contents of Services Legislation and our basic aim is to start consulting with the Aboriginal and Torres Strait Islander people as to their requirements and ideas relative to this matter. The Government's intention is to produce information after consultation which can then be tabled in the Parliament, if possible, to allow community comment and further consultation."<sup>45</sup>

The rules of the consultation game were less than clear. The Bamaga meeting concluded on Friday afternoon, 9 July 1982. The Torres Strait area officer of DAA (the Commonwealth Department of Aboriginal Affairs) sent a telex to the DAA Brisbane office advising that the AAC had rejected the government's land tenure proposals and suggestions for services legislation. A working committee had been elected to visit all reserve communities and discuss the whole matter with the people before the next meeting of the AAC. The council had resolved that the committee and any future conference have access to independent legal advice. The officer said his information was second-hand but he thought it was reasonably accurate.

Mr George Mye MBE, a member of the Islander Advisory Council, was quoted on ABC news that night saying that all thirty-seven Islander representatives had voted against deeds of grant in trust. Given the remoteness of Bamaga and the closed access to the meeting, it took time for a clear picture to emerge. The two Palm Island representatives at the Aboriginal meeting, Tom Geia and Rachel Cummins, appeared on the ABC television programme "Nationwide" on 13 July 1982. They said the Aboriginal representatives were not prepared to accept deeds of grant in trust at this stage. They wanted to compare it with other forms of security to be explained by the Land Administration Commission representative, Mr Wally Baker. They saw the meeting's outcome as a "slap in the face" for the premier because this was the view not just of the radicals but what was sought by reserve residents. The deliberations of the two advisory councils were not what the government wanted this time.

Earlier in the day, Steve Mam, the Queensland Chairman of the National Aboriginal Conference, claimed the Aboriginal and Islander leaders had voted 50 - 1 against the state government's land legislation. The premier issued a press statement: "He said no vote on the Deed of Grant in Trust title was taken at the meeting." In time, the official minutes of the Islander meeting appeared recording "that this conference support the



feeling of the majority of Torres Strait Island people seeking for inalienable freehold title to their land."<sup>46</sup> It was carried 35 - 1. The Aboriginal minutes did not appear until September. Meanwhile Rachel Cummins taped her account of the meeting. The tape was played at the Central Queensland Land Needs Conference on 7 August 1982:

On the 6th, Tuesday, Mr Killoran arrived but was at the Torres Strait Islanders Advisory Council meeting. David Brown outlined the purpose of the meeting and asked councillors if we would give some thought to the services legislation. Mr Les Stewart, Chairman of Cherbourg, was elected Chairman of the AAC, asked councillors' views on the Aboriginal courts, police and various other matters. The Advisory Council did offer suggestions.

Mr Killoran and Mr Tomkins were introduced to the AAC and after some discussion with the AAC members - the AAC members decided that there was a general lack of knowledge with the deed of grant in trust and we decided that we would, you know this was outside the meeting, we decided that we didn't want to go ahead with any talk of services legislation until we'd sorted out the land tenure problem. So I moved a motion *that the Advisory Council not make any more suggestions for the services legislation* and instead we asked Mr Tomkins about deeds of grant in trust because we were not satisfied and we decided that we could not talk about services until the land problem was sorted out. This motion was supported by all but one reserve - Cherbourg - who said they had attended the meeting to advise the Minister on services legislation.

On Wednesday 7th, Mr Killoran and Mr Wally Baker attended the meeting and gave speeches. Mr Wally Baker stated that freehold title was the best land tenure and that deed of grant in trust was second best but it was safer in that no-one can buy or sell trust land. At this stage, I asked Mr Tomkins if his government recognised prior ownership by Aboriginal people. He gave the reply that we, all Australians, are one and all benefited from this land. He did not answer the question directly. Mr Geia asked Mr Baker if freehold tenure is better, why can't we get freehold title. Mr Baker said deeds of grant in trust have been used for many years and because of this, legally it is something the government has adapted to suit the reserves and Mr Baker felt that because deed of grant was used, it would be a safer proposition. He said that the deeds of grant in trust was the unique situation adapted for the Aboriginal people. I asked then why the government can't draw up some

legislation to protect freehold title from being sold or bought and also asked that the word freehold not be used because of the legal connotations of freehold but instead I asked that it be a land tenure that could never be lost by us the Aboriginal people but gives us, the Aboriginal people, the complete ownership. Mr Baker said that a special land tenure of this kind can be drawn up, but it would take a lot of work and a special act of parliament. At this stage, Mr Killoran excused himself, Mr Tomkins and Mr Baker from the meeting.

On the 8th, Thursday, there was more general discussion on land tenure. Mr Killoran, Mr Baker and Mr Tomkins did not return until Thursday afternoon. Palm Island, at this stage, asked that it be recorded in the AAC minutes that Palm Island does not accept the Deed of Grant in Trust. The afternoon session of the AAC asked for a lawyer to be present in future at all AAC meetings to act on our behalf. There was disagreement with Mr Killoran, and Mr Stewart felt that the lawyer was not necessary because no advice was actually tabled at this meeting. Mr Killoran said that it was just a stepping stone into more consultation between the government and the Aboriginal people and that further consultation would take place through the elected working party. I objected to Mr Killoran and said that the Minister did table information in parliament and through the media of what happens at AAC meetings and therefore our advice to him should be informed advice and not AAC hearing only government views on matters. The motion was accepted, and I can't really remember who moved this motion, but I believe, if my memory's right, it was Roy Gray from Yarrabah - he moved a motion *that a lawyer attend all future AAC meetings and working party - and any meetings of the working party*. The motion was accepted by all members except Cherbourg and Mr Les Stewart said that he didn't want a lawyer present because he didn't trust them; and I - we didn't go into that in any detail because at that stage we didn't even decide what lawyer we were going to ask to act on our behalf.

On Friday, the last day, Mr Killoran, Wally Baker and Mr Tomkins were present when I asked Mr Baker to repeat what he had previously stated about the land tenure - the alternative. He did and I moved a motion that *the AAC does not accept deed of grant in trust at this stage until further investigation is carried out by the Queensland Government and the Lands Department of alternative land tenure as outlined by Mr Wally Baker*. Mr Roy Gray from Yarrabah seconded that motion and Mr Geia asked that votes be recorded according to the reserves; for example, Palm Island votes 'for'; Yarrabah votes

'for', etc. and you know some say vote against. But Mr Les Stewart, who was the chairman, said there was 'No' for Cherbourg. Everyone voted and Cherbourg abstained from voting. That was the tie up of the whole meeting.

When Thomas Geia and myself came back to Palm Island, we had reporters ring and ask what happened at the AAC meeting and we gave our report on it and they - it went to the papers. And apparently, Mr Petersen and Mr Les Stewart reported that there was no motion put and no-one voted on it but we do know because I asked that the minutes be read back, the motion be read back through the minutes, you know, on what the motion was. From that, from what Mr Petersen was saying, we sent some telegrams to the Premier, to Tomkins and also one to Killoran and to Llew Edwards and to Ed Casey [the Leader of the Opposition] asking what they were going to do about our motion that the deed of grant in trust and also we sent telegrams to Les Stewart and the secretary of the AAC whose name is Fred Cobbo, Deputy Chairman of Cherbourg and asked for the minutes of the meetings. So far, from all these telegrams, we haven't had any reply. Now, we've also sent telegrams to Mr Fraser and Mr Wilson of the Federal Government, and we haven't had any replies from them either.

The telegrams sent to the politicians on 21 July 1982 had stated: "Please advise what action the state/federal government proposes following rejection of the 'Deed of Grant in Trust' by the Aboriginal Advisory Council." Roy Gray was present at the Land Needs Conference and confirmed Rachel Cummins' account. Messrs Hedley Twaddle and Les Stewart, chairmen of the Woorabinda and Cherbourg Councils, believed there was no acceptance or rejection of deeds of grant at Bamaga, only a decision to consider the matter further after receipt of further legal advice. A five member working party was elected at Bamaga to continue considerations. Tom Geia was to be chairman and the AAC agreed "that the working party should have a legal representative to assist it."<sup>47</sup>

## **9. The Working Party**

In a letter to Archbishop Rush dated 3 August 1982, Mr Stewart asked if I "could be available to assist the Aboriginal Advisory Council working party in their inquiries into the wishes of the communities regarding the new

laws". Mr Geia called a meeting of the working party for 12 August 1982. I wrote to Dr Edwards on 9 August:

I have indicated my willingness to attend the working party meeting on Thursday 12 August. However, my own view is that the working party should be provided with the services of senior counsel who can come to the issues afresh and with the indisputable cloak of independence. As you know, I have kept my dealings with Government as open as possible. But, for over three months, the Director of the Department of Aboriginal and Islander Advancement has declined to grant my request to meet with him or members of his Brisbane Office. Furthermore, I am the advisor to the Queensland Catholic Bishops who have already spoken clearly about the question of land tenure and the apparent shortcomings of deeds of grant in trust.

As the Advisory Council has already formally resolved to seek legal advice for itself and its working party, I think it more appropriate that the council and working party be provided with funds from your government to employ the services of senior counsel. With the experience of my last six months contact with reserve residents, I would be happy to give whatever assistance might be appropriate.

No funds were available for the meeting. As chairman of the working party, Mr Geia wrote to Mr Tomkins:<sup>48</sup>

As you are aware, the Aboriginal Advisory Council at its recent meeting in Bamaga from 5 - 9 July 1982 decided to set up a working party of five members and two observers to consult with communities and to draw up submissions about land tenure and services legislation. Also, the Council voted that the working party be provided with an independent legal adviser to assist in its deliberations. Furthermore, the Council voted unanimously with two abstentions not to accept deeds of grant in trust at this stage and called upon the Queensland Government and Lands Department to investigate alternative land tenure as outlined by Mr Wally Baker.

I understand the Queensland cabinet is to consider a draft submission for Services legislation by the end of August. As chairman of the working party, I am concerned that the working party have the opportunity to make its views known to government before consideration of the draft submission.

Today, I have called a meeting of the working party to take place at Palm Island from Tuesday, 24 August - Thursday, 26 August. Following the resolution of the Advisory Council, I seek government funds for travel for all members and observers of the working party to and from Palm Island, for accommodation, funds for a typist/stenographer for the meeting, and funds for an independent legal adviser for the meeting and thereafter, as required.

Mr Tomkins refused funds. Having checked with Mr Stewart, he wrote: "The Chairman indicated that the sub-committee would work on these matters with the Department and report back to the next meeting of the Advisory Council."<sup>49</sup> For its part, the Commonwealth would not get involved. So Mr Geia approached the churches on 20 August for funds "so that consultation might be possible before the Queensland Cabinet considers new laws".<sup>50</sup> Aware of the Acting Premier's statement that cabinet would consider a submission on the legislation sometime in August and of the delay and controversy since the Bamaga meeting, the church leaders replied: "Your urgent request to our churches of Friday, 20 August, has been considered by the three of us. As you know, we have been anxious for some time that Aboriginal and Torres Strait Islander reserve residents be fully consulted about proposed changes to laws governing them. We have communicated our distress to Government for declining your request which appears to be reasonable, necessary and proper. We hereby meet your request and undertake to fund the inaugural meeting of your Aboriginal Advisory Council working party."<sup>51</sup>

The working party met for three days and sent a one hundred page report to all Aboriginal communities within the week. On the last day of meeting, they invited the ABC's "Nationwide" crew to cover the proceedings. They published this statement:

We are the members of the working party of the Aboriginal Advisory Council who were elected at the fifteenth meeting of that Council, held at Bamaga from the 5th to the 9th July 1982. In view of the contradictory reports which have been made about the Bamaga meeting, we wish to make public our knowledge of what was resolved at Bamaga:

1. Having heard from Mr Wally Baker, Land Commissioner, Rachel Cummins, Deputy Chairman of Palm Island Council, and Roy Gray, Deputy Chairman of

Yarrabah Council, moved and seconded a motion that the Aboriginal Advisory Council does not accept the Deed of Grant in Trust at this stage until further investigation is carried out by the Queensland Government and the Lands Department of alternative land tenure as outlined by Mr Wally Baker. That motion was carried without dissent by all members present except that the two representatives from Cherbourg Community abstained from voting, and said they would like to discuss the matter further with their Community.

In his letter to Mr Tom Geia, Deputy Chairman of the Aboriginal Advisory Council and the Chairman of our working party, Mr Tomkins has said: "I understand further that no recommendation concerning the Deed of Grant in Trust provision was made by the Aboriginal Advisory Council, because members resolved that some additional time was needed for them to return home and discuss this with other community council members and residents."

Unfortunately Mr Tomkins has got his facts wrong. The Aboriginal Advisory Council totally rejected the Deed of Grant in Trust, and we expected that the next step would be that the Government would draw up an alternative suggestion for land tenure and submit it to us for consideration.

2. Mr Roy Gray, Deputy Chairman of Yarrabah Council, and Mr Richard O'Brien, Deputy Chairman of the Lockhart River Council, moved and seconded a motion that a lawyer attend all future meetings of the Aboriginal Advisory Council and all meetings of the working party. All members of the council voted in favour of this motion except the two representatives from Cherbourg community.

3. We were elected as a working party of the advisory council to meet and discuss proposals for services legislation and to travel to the various reserve communities to hear their views on the new laws which will affect them. We expected that we would be able to meet within a short time after the Bamaga meeting so that we might report back to another meeting of the advisory council, which would make recommendations to the government about services legislation.

We do not agree with Mr Tomkins' statement that the action of the chairman of the working party "in calling a meeting of the working party at Palm Island is not consistent with the purposes for which this group was nominated at Bamaga, or with the responsibilities of the Aboriginal Advisory Council". We think it is up to us when we meet and Mr Geia, as chairman of the working party and Deputy Chairman of the Aboriginal Advisory Council, has all the

authority needed to call a meeting of the working party. We do not understand Mr Tomkins' obstructive statement that "Mr Geia had absolutely no authority to act in the way he did in calling the Palm Island meeting." We honestly believe that we are doing the job we were elected to do, to the best of our ability, for the benefit of our people.

We hope this statement publicly clarifies the views of the elected representatives of Aboriginal reserve communities about the Deeds of Grant in Trust and explains why we were anxious to meet as a working party seven weeks after Bamaga. We hope the Government will recognise what we say.

Senator Baume, who was no longer Minister for Aboriginal Affairs, happened to be on Palm Island that day visiting St Michael's school in his capacity as Minister for Education. The working party joined him and Palm Islanders for lunch. The "Nationwide" crew filmed the lunch. One resident asked Baume, "Why can't you just give it (the land) to us and forget about the red tape?" He replied, "You talk about red tape. In the end, it is only careful attention to legal detail that can make it safe." His successor as Commonwealth Minister for Aboriginal Affairs, Mr Ian Wilson, was making his first official visit to Brisbane that day. Maintaining the Commonwealth's optimistic and placatory style, Wilson said he was "encouraged by the consultations that were continuing between representatives of Queensland Aboriginals and Queensland government officials and ministers".<sup>52</sup> The "Nationwide" programme went to air on 30 August.

Steve Mam was vindicated in his claim of 13 July that Aboriginal leaders had voted 50 to 1 against the legislation, though his mathematics or information was a little out. The working party claimed that all but two of the 27 Aboriginal Council representatives voted not to accept the DOGIT until further investigation was carried out by the Lands Department. The Islanders had recorded a 35 to 1 vote for inalienable freehold. The premier's claim that "no vote was taken" was discredited. Mr Tomkins issued a press statement saying that land tenure "was no longer a negotiable issue"; services legislation "would be dealt with during the current parliamentary session"; and the advisory councils "would be given the opportunity to air their views about the legislation before it went before Parliament".<sup>53</sup> Next day he told parliament that the working party "was not formed for the purpose of calling its own meetings". He said, "The government will tell

them when it is ready with its services legislation". He said Mr Geia and his Deputy Chairman were "the two persons who are creating the trouble"; however he assured the Leader of the Opposition that "in due course the working party will get together and study the services legislation".<sup>54</sup>

In an exchange of telex messages, the Commonwealth Minister Mr Wilson said "any inference that the (working parties) are under departmental control would undermine what would otherwise generally be accepted as free and full consultation." He sought Mr Tomkins' confirmation that it was not his "intention to imply that the commitment given by your government would be discharged merely by seeking a commentary on a 'fait accompli'." Mr Tomkins responded: "Services legislation will not be introduced to Parliament until we have consulted with the working party and the advisory council ... which of course will depend on the ability of my department to talk exclusively and directly with the Aboriginal representatives without external interferences such as are occurring at the present time."<sup>55</sup>

The working party as constituted at Bamaga met only once - at Palm Island. At Cherbourg in September, a differently constituted working party met with DAIA officials to discuss services legislation. I wrote to Dr Edwards on 9 September 1982 suggesting the time was ripe to table in parliament the available information from the consultation process to date. It was time for an appropriate consultative step funded by government, with the Commonwealth Games only three weeks away. Replying to calls for consultation by the Catholic Commission for Justice and Peace, Mr Tomkins, Minister for Water Resources and Aboriginal and Island Affairs, wrote on 7 September 1982:

The deferral of drafting and the introduction of services legislation was the wish of the advisory council to enable them to consider further the implications and alternatives of the issue. This decision was formally made at the two council meetings at Bamaga in July and in the interim many councils, not necessarily those most publicly vocal have made a great deal of progress in establishing their exact wishes. Further meetings of the Advisory Councils to firmly base draft legislation are imminent.

These measures have been taken so that the best possible opportunity can be afforded for careful consideration by those concerned of the government's



proposal. The Aboriginal and Islander Advisory Council Councils are in fact now engaged in that process at a very meaningful level.<sup>56</sup>

On 21 September 1982, Mr Tomkins told Parliament that "As chairman of the working party, Mr Geia wanted regular meetings". He said, "If people wish to get together for meetings, they will not do it at the government's expense".<sup>57</sup> He was later to confirm this view to parliament on 28 October 1982.<sup>58</sup> But then on 22 November 1982, Mr Tomkins confirmed in writing that Mr Geia "is not, never has been, and has no authority to be Chairman of the working party".<sup>59</sup> In inter-ministerial correspondence, Mr Tomkins was very critical of the church leaders' decision to fund the working party. He made a number of gratuitous and insulting assertions against the heads of churches and continued: "Since Bamaga, I have held a series of talks with Mr Stewart and with the chairman of the Torres Strait Islander Advisory Council, Mr Nona, leading up to meetings with the working parties which are to take place later this month. Had the Archbishop and his colleagues cared to consult with me they would have learned this. We are therefore maintaining consultation with the Aboriginal representatives and we have never ceased to do so. I hope that the arrangement can continue, uninterrupted by self appointed third party experts, and free from the needless anxiety which these disruptions are causing in Aboriginal community."<sup>60</sup> He said I had "featured prominently in these activities " and that it was his "intention to convey these matters personally to Mr Brennan and his superiors at the first opportunity". He never wrote to the heads of churches. I had been trying since April to meet again with Mr Killoran, not being granted a meeting until 28 September. I was not granted another meeting with Mr Tomkins until 16 November despite continued requests.

On 22 November 1982, a large meeting was convened by local churches in Rockhampton. No state government member was prepared to speak. So the organisers invited Mr Charles Porter, the retired Queensland Minister for Aboriginal Affairs. After I had given a legal analysis of the deed of grant law, he said he could not see why the government did not change the law as church leaders were suggesting. Change was in the air.

It turned out that, despite his statements, Dr Edwards was not chairman of the cabinet sub-committee on services legislation. In fact there was no such sub-committee. This state of affairs came to the notice of the

churches on 16 November and was communicated to the Commonwealth next day. Mr Tomkins became aware of the churches' understanding on receipt of a letter dated 23 August 1982 but "this was seen as a misunderstanding or error by Archbishop Rush but of insufficient moment to warrant any correction in my letter to Dr Edwards dated September 21st."<sup>61</sup> When the matter was brought to the attention of Dr Edwards who had said he was chairman of such a sub-committee, thereafter never correcting the misapprehension, he simply acknowledged receipt of the correspondence and added "I have noted the comments you have made following your recent discussions with Mr Tomkins."<sup>62</sup>

Meanwhile the five member Aboriginal working party whose membership had been confirmed by letter from Mr Tomkins to Mr Wilson had not met since their Palm Island meeting. In September there had been a meeting of some of its members with other persons at Cherbourg. Another meeting was called in Brisbane for December. One member of the working party, Mr Roy Gray from Yarrabah, did not attend the Cherbourg meeting in September. Despite his eagerness to attend, no travel arrangements were notified to him. On the night before the Brisbane meeting in December, Mr Gray sought church assistance as he wished to attend the next day's meeting, had not been invited to attend, and no provision had been made for his travel to the meeting. Accordingly, he was provided with assistance and he attended the meeting. Before seeking assistance, Mr Gray wrote:

Mr Les Stewart did not notify me of any travel arrangements. On 1/09/82 I then phoned David Brown (DAIA) to obtain information about these. He informed me that it had been decided that Vincent Schreiber would attend. Who made this decision I still do not know.

I was very upset by this second exclusion and relayed my feelings to the council at Yarrabah. At no time had they prior knowledge of these events.

I must emphasise at no time was I communicated with over this matter by Les Stewart. I was prepared and packed to go on both occasions.

The Yarrabah Council met to discuss the matter. The council minutes state:<sup>63</sup>

Cr Gray expressed his disappointment at not being told that he was not attending the meeting in Brisbane and that the chairman had been selected

instead. He said he thought it a bit unusual as he was selected by the Advisory Council to attend all advisory working party meetings as he was a member of that organization. Mr Harris (the DAIA manager) said that he knew nothing about the matter until Cr Schreiber asked him to ring Brisbane and see about his travel arrangements. Cr Neal said he was disgusted about the arrangements. He said that when someone is elected by the Advisory Council to attend meetings, then that person should go.

Moved by Cr Gray seconded Cr Neal that this Council send a letter of protest to that meeting disgusted at the way Cr Gray has been treated and that it was an insult to the Yarrabah Council to bypass a legally elected member of the working party. This was not put to a vote. Cr Gray then asked Ms Patterson to type a letter to that effect to be given to Cr Schreiber to hand to the chairman of the Advisory Council meeting.

Cr Gray added that as it was only a working party meeting and not an Advisory Council meeting then he should attend. He said that Les Stewart had sent him a telegram to say that he was to go. He said, "We had legal advice at our meetings - I think it goes a lot deeper than that. We were making sure minutes were being kept accurate."

Mr Killoran found no irregularity in the attendance of a representative from Yarrabah in place of Mr Gray. In a letter dated 13 December 1982, declining to reimburse the cost of Mr Gray's airfare, Mr Killoran stated: "When arranging for the group to meet at Cherbourg and in Brisbane, Mr Stewart informs me that he considered it customary and proper to communicate with the chairman at each centre represented, and to allow that person, as elected head, the opportunity to attend by arrangement with the individual nominee. Accordingly, Mr Stewart received advice from Mr Schreiber, as chairman, of his intended attendance." No such arrangement was made between Mr Schreiber and Mr Gray. The consultation process with Aborigines was being manipulated so that young turks like Mr Gray were excluded even though he was duly elected as a member of the working party.

On 13 July 1983, Mr David Brown, Assistant Director of DAIA, informed a meeting of Aboriginal representatives and departmental officers that their ideas would be very helpful to the department and the working party "in our task of developing up recommendations which eventually will take the form of draft legislation for consideration by the Aboriginal

Advisory Council itself."<sup>64</sup> The DAIA then prepared a document entitled "Work in Progress" which summarised the recommendations of the Aboriginal working party and other groups for services legislation. That document concluded with the words: "The working party are still however considering these and other matters before framing final conclusions for consideration by the Aboriginal Advisory Council". Neither the advisory council nor the working party met again.

- 1 (1965) 240 QPD 2540.
- 2 *Ibid.*, p. 3153.
- 3 *Ibid.*, p. 3154.
- 4 (1971) 258 QPD 1917.
- 5 *Ibid.*
- 6 *Ibid.*, p. 2152.
- 7 (1974) 266 QPD 1698.
- 8 (1975) 268 QPD 101.
- 9 (1978) 276 QPD 3278.
- 10 *Ibid.*, p. 3280.
- 11 (1979) 277 QPD 3670.
- 12 (1979) 117 CPD 178-9 (HoFR).
- 13 J. Bjelke-Petersen to Bishop W. Murray, 8 February 1979.
- 14 *Ibid.*, p. 3153.
- 15 (1980) 85 CPD 2307 (Senate).
- 16 (1981) 283 QPD 341.
- 17 Aboriginal Advisory Council, 13th Meeting, Minutes, p. 9.
- 18 Australian Council of Churches, Justice for Aboriginal Australians, 1981, p.64.
- 19 K. B. Tomkins to Queensland Clergy, 2 November 1981.
- 20 Aboriginal Advisory Council, 14th Meeting, 5 August 1981, Minutes, p. 10.
- 21 (1981) 284 QPD 2096.
- 22 K.B. Tomkins to D. Pollard, Secretary, Catholic Commission for Justice and Peace, 16 September 1981.
- 23 *Ibid.*
- 24 DAIA, A.I.A. News, vol. 6, no. 2, 1981, p. 1.
- 25 (1981) 285 QPD 3391.
- 26 Department of Aboriginal Affairs, "Aboriginal Land Tenure in Queensland", Meeting between Minister for Aboriginal Affairs and Queensland Branch of National Aboriginal Conference, 3 March 1982.
- 27 Courier Mail, 16 March 1982.
- 28 Courier Mail, 19 March 1982.
- 29 Senator P. Baume to Archbishop F. Rush, 17 March 1982.
- 30 Premier's Press Statement, 1 March 1982.
- 31 (1982) 287 QPD 5172.
- 32 Opinion appended to statement by Heads of Churches, 30 March 1982, p. 6.
- 33 (1982) 287 QPD 5476.
- 34 (1982) 287 QPD 5566.
- 35 (1982) 287 QPD 4541.
- 36 (1982) 287 QPD 4667.
- 37 (1982) 94 CPD 1335 (Senate).
- 38 (1982) 94 CPD 1424 (Senate).
- 39 (1982) 94 CPD 1280-1 (Senate).
- 40 (1982) 94 CPD 1778 (Senate).
- 41 Canberra Times, 3 June 1982.
- 42 (1982) 93 CPD 399-400 (Senate).
- 43 (1982) 126 CPD 591 (H of R).
- 44 K. B. Tomkins, Press Statement, 6 July 1982.

- 45 L. Edwards to Archbishop F. Rush, 6 July 1982.  
46 Minutes of the 12th Torres Strait Councillors Conference, Bamaga, 6-8 July 1982, p. 3.  
47 Minutes of Meeting of the Aboriginal Advisory Council, Bamaga, 6-8 July, 1982, p.17. These  
unconfirmed minutes were issued by Les Stewart in September 1982.  
48 T. Geia to K. B. Tomkins, 17 August 1982.  
49 K. B. Tomkins to T. Geia, 23 August 1982.  
50 T. Geia to church leaders, 20 August 1982.  
51 Letter of Archbishops F. Rush, J. Grindrod & Rev D. Brandon to Mr T. Geia, 23 August 1982.  
52 I. Wilson, Press Release, 27 August 1982.  
53 K. B. Tomkins, Press Statement, 30 August 1982.  
54 (1982) 288 QPD 647.  
55 I. Wilson to K. B. Tomkins, 1 September 1982, and K. B. Tomkins to I. Wilson, undated.  
56 K. B. Tomkins to Bishop W. Murray, 7 September 1982.  
57 (1982) 288 QPD 988.  
58 (1982) 289 QPD 1926.  
59 K. B. Tomkins to author, 22 November 1982.  
60 K. B. Tomkins to L. Edwards, 21 September 1982.  
61 K. B. Tomkins to author, 22 November 1982.  
62 L. Edwards to author, 24 November 1982.  
63 Yarrabah Council, Minutes, 1 December 1982, pp. 4-5.  
64 Aboriginal Advisory Council Working Party, Minutes, 13 July 1983.

## **PROPOSALS FOR SELF-MANAGEMENT, 1982**

Having spent much of 1982 visiting the Aboriginal communities, I had regular meetings with councils and community members. I circulated to all communities a series of consultation documents. The first document published in April 1982 set out the issues to be considered. The second provided a list of practical questions. The third published in July set out a basic approach and philosophical presuppositions. The fourth was a comprehensive compilation of recommendations by Queensland Aboriginal groups in the preceding three years. Then in November 1982 I published a proposal for services legislation and administration and, with the approval of Aboriginal councillors, put it to the National Party machine after the Commonwealth Games were over. Further amendments to the Land Act were also discussed. I made the following recommendations for services legislation:

### **1. The Delivery of Services**

All citizens of the state, no matter what their race, are entitled to the delivery of services which are generally agreed upon as the basic liberties and services to which members of the community are entitled, regardless of their ability to pay or contribute to the provision of same.

How are these services to be delivered to communities which are presently isolated and under-trained? In recent years, a special government department (DAIA) has provided most of those services. I think the time

has come to entrust the delivery of some specialist services to the various specialist departments which would be provided with some assistance from a Government liaison unit, to be called the Bureau for Aboriginal and Islander Communities, which could advise on the delivery of services to these communities.

All government-run educational institutions in these communities should now be conducted by the Education Department. That department seems to have become far more aware of the demands, possibilities and methodology of Aboriginal and Islander education in recent years. It would be necessary for that department to set up a special training centre in the Torres Strait region for teacher aides. Communities such as Palm Island and Yarrabah would profit by the provision of small classes for years 11 and 12. Due to lack of numbers, it may be that private institutions run by Churches or sponsored by private groups would be the only realistic way to provide this service at the moment. The provision of special 'transition' courses such as the TAFE ACCESS course should be encouraged.

The three year old state cabinet resolution that all health services gradually be handed over to the Health Department should have run its course. The responsibility should be transferred forthwith upon the passage of the services legislation.

An accused person on a reserve community should have the same right to due process as any other resident of the state. Justices of the peace should be trained and should enjoy the confidence of the community. An accused should be entitled to have legal representation if he be charged with an offence which would normally be adjudicated in a Magistrate's Court if heard and determined in a town. Special Aboriginal courts presided upon by local justices should continue as local courts which determine breaches of council by-laws only. A breach of by-laws should be punishable by a short-term in prison only if the defendant has offended often. Normally, the Aboriginal courts should be able only to impose fines or community service orders for breaches of by-laws. In the Aboriginal court, the defendant should be entitled to representation by a councillor or any other resident of the community. There should be a right of automatic appeal to a magistrate with a stay operating on any penalty imposed. The court should have jurisdiction over all persons in the Council area, irrespective of a person's race or residence status. Councillors should not be eligible to sit on courts. The setting up of such courts should be a matter for the Justice Department.

It is a regrettable fact that assaults to the person are very prevalent on a number of communities particularly where alcohol is readily available. These communities are entitled to adequate policing by the Queensland Police Force. The responsibility for policing of communities should rest with the Queensland Police Force. Because of the racial composition of these communities, statutory provision should be made for the selection and training of Aboriginal and Islander police aides who will be employed at a proper wage by the Queensland Police Force. As in the Northern Territory, these aides should be approved for selection by both the local council and the police force. They should undergo an initial period of training at the Police Academy and thereafter receive on-the-spot training with incremental wage increases appropriate to the level of training reached and duties performed. The training and powers of Aboriginal and Islander police aides should be such that they may exercise the same functions with respect to a white person as to people of their own race. Police aides should be permitted to work in their own community, subject to good behaviour. Lock-ups should be the responsibility of the local constabulary and should be improved. Offenders who are held in custody prior to local hearings or serving short-terms should be held at the lock-up or in the nearest jail in accordance with standard police practice, and regardless of the offender's race.

No council and no court should be given the unfettered power of banishment. Restrictions on access to alcohol in community areas should not be on the basis of race nor residence status. Proper probation services should be available on the larger communities.

Australia Post and Telecom should provide the usual facilities which are provided to isolated communities. After all, five reserve communities number more than one thousand residents.

Banking facilities such as are provided in other small communities should be provided according to population, isolation and turnover. In relation to all of these services, they should be delivered to members of each community and to communities regardless of the race or identity of the members or communities.



## **2. Local Government Structures**

The normal provision of the Local Government Act should apply with respect to nominations, elections, term of office, size, remuneration, and duties of councillors subject to these qualifications. Because of the complexities of kinship and tribal groupings, community should be consulted about the size of a council. It should be of sufficient size to represent the major groups in the community. Because of the travel habits of many 'residents', the community should be consulted about the residence requirement for voters and candidates at an election. Councils should be constituted by 3, 5, 7 or 9 councillors.

As these communities are presently under-trained and in receipt of much government assistance (and therefore enquiry), the chairmen of the councils are very busy people. There should be provision for payment of a salary to the council chairman which varies according to the size of the community (say, max. \$5-10/resident/annum). The chairman of the council should be empowered to split his salary with his/her deputy if they wish to split the duties.

When the new law is passed, the councils' by-law making power should be exercised not by the simple ratification of model by-laws issued from elsewhere but by council consideration of possibilities with the provision of legal advice, if requested.

The vesting of responsibilities in councils necessitates the abolition of the role of manager as presently defined in the Aborigines Act 1971. The new legal structure must provide for an administrative staff which implements the policy decisions of the elected council and is accountable to that council. As most councils, like their communities, are presently under-trained, there arises the question of financial accountability. Presently, the council is accountable to the manager who is, in turn, accountable to the director.

At least in the case of Palm Island and Yarrabah (thirty-four per cent of the Aboriginal reserve population), those councils have submitted to government that they should assume financial responsibility as well as a policy-making role at the local government level. There can be no justification for denying these two communities that role for their councils,

a role performed by other local councils including Aurukun and Mornington Island.

When it comes to attracting good personnel, these councils cannot offer the same security as the public service nor the same conditions as less remote local councils. Also, they require personnel who like working with Aboriginal people. Yarrabah's suggestion of secondment of DAIA personnel for a fixed term of three years could achieve the provision of suitable personnel during the transition years to proper local government with eventual council employment of the shire clerk and others. The personnel provided by DAIA for the transition would hopefully be people committed to the realisation of local government by these communities within three years and may be minded to seek employment then from those councils.

Other communities not wishing to make such a prompt transition might be placed in a position akin to that of shires governed by an administrator and which are moving towards responsible local government. The administrator (or manager) should be charged with the task of gradually transferring powers to the local council. An Order in Council should specify the duties of the administrator and the council and the period during which the respective powers are to be exercised.

Ideally, the communities should have sufficient funds available so that they might employ a community development officer as well as the shire clerk so that the clerk's duties are confined to the implementation of council policies for material development and maintenance of the community area.

Each community council should receive regular visits from an officer of the Bureau for Aboriginal and Islander communities so that complaints and recommendations about the provision of government services to the community might be made.

### **3. Protection of Reserve Lands**

The minister should consult with the communities before issuing deeds of grant in trust to determine if the elected council is the most suitable trustee of land. In communities lacking any tribal identity or cohesion, the elected council is the obvious trustee of land. However, where there is tribal cohesion and identifiable family groups, it may be better to nominate representatives of the tribes or family groups as trustee so as to avoid the

uncertainties of trustees being replaced every three years and so as to ensure representation of all groups having claims to land of historical significance. This would also have the advantage of giving legal recognition to the status and duties of elders in the more traditional communities.

The 'public areas' of community townships and their roads of access should be viewed as public areas which are open to all subject to the ordinary laws of the land. Within the townships, tenants should have the usual rights of occupiers and the trustees, the usual powers of landlord.

Those who enjoy resident status in a community as at a date to be fixed and their spouses and dependents should have the right to be on community lands outside the township area. Other persons should obtain a permit from the trustees to enter upon the lands unless such entry is for the purpose of performing a statutory function or common law duty.

The trustees should have power to exclude any person from the community lands outside the township area. Permanent residents should have a right of appeal against exclusion to the Aboriginal court and thence to a magistrates court. Any Aboriginal (or Islander in the case of Torres Strait) refused a permit to enter community lands should also have a right of appeal.

The trustees should have power to recommend provisions for by-laws affecting community lands outside the township area to the local council if they are not themselves the council. Any council by-laws affecting community lands outside the township should be referred to the trustee for approval.

The purpose of permits should not be the protection of the local community from contact with society at large but rather the protection of community lands from exploitation and the recognition of the local community's claim to exclusive possession and use of community lands. Entry to public areas of townships should not require the issue of permits; nor should visitation of a community resident in his or her residence. The issue of over-crowding is not to be met by permit provision but by adequate provision of housing and proper supervision by local councils not as permit issuers but as landlords.

Permanent residents as at a fixed date and their dependents and spouses should be entitled to resident status thereby allowing them unfettered access to community lands outside the township. Others should obtain either resident status or a visitor's permit to enter upon community

lands. Visitors' permits may be subject to conditions about hunting, foraging, fishing or access to special places such as sacred sites. Any visitor breaching conditions of a permit may be excluded forthwith from the community lands. Police may use such force as is reasonably necessary to remove an offending visitor.

Residents or visitors may be charged with a breach of the by-laws relating to community lands and as penalty may be excluded from the community lands for any period in addition to any other prescribed penalty. The trustees may abridge the time for exclusion at any time.

Some landholders in the State are totally protected from the prospect of mining on their lands under s.113 of the Mining Act which allows the Governor-in-Council to declare private land exempt and therefore not subject to any mining title, tenement or permit. No mining tenement can be granted over improved land or over land within a city or town of an area less than 2,000 square metres unless the owner gives consent or unless the tenement is confined to limits set down by the wardens court. Landowners of land which was alienated from the crown under the 1860, 1868 or 1872 legislation still have mineral rights insofar as they, and not the crown, are owners of the minerals (other than gold) in their lands. Landowners of land which was alienated prior to 1910 and which is not subject to the Agricultural Lands Special Purchase Act of 1901 are the owners of coal contained in their lands. If the crown resumes land from a landowner whose land was alienated under the 1860 or 1872 legislation, that landowner is entitled to compensation for the minerals contained therein. So, under existing law, there are some landowners in Queensland who have mineral rights. And many landowners are protected significantly from the prospect of mining occurring on their land. Whatever should be the situation with Aboriginal lands, it is nonsense to say that no person in the community has mineral rights and that anybody's land can be mined at any time.

Aboriginal communities should be put in the same position as private landowners for the purposes of permits to enter upon their lands for mining purposes<sup>1</sup>, for the measure of compensation payable in respect of mining<sup>2</sup> and for determination of compensation payable<sup>3</sup>. If any landholder has special rights with regard to minerals, then aboriginal communities should have special rights consonant with their need to protect lands for traditional and spiritual purposes and with their undoubted special relationship to the land.

In addition to the normal rights and protections of ordinary private landholders, Aboriginal and Islander community trustees should continue to enjoy the rights presently enjoyed by the director under the existing Acts thereby empowering the trustees to enter into agreements for payment to the trustees, not of a share of profits, but of a fixed amount for the tonnage removed with a fixed minimum amount set per annum for the currency of the agreement.

#### **4. Recognition of Traditional Rights**

Provisions similar to sections 29 and 31(2) of the Local Government (Aboriginal Lands) Act 1978 should be placed in the services legislation thereby giving community residents the rights to hunt, gather, and to use forestry and quarry materials for domestic purposes. This would also allow the trustees to use forestry and quarry materials for community purposes. Section 51(1) (d) of the Fisheries Act 1976 should be amended so as to allow community residents on lands subject to Deeds of Grant in Trust to do fishing in their streams and adjacent seas for other than commercial purposes, freed from legal constraints.

The Fauna Conservation Act 1974-1979 should be amended to allow community residents on lands subject to Deeds of Grant in Trust and residents of country reserves to hunt and gather fauna and flora for domestic purposes without payment of royalty or other legal constraint (except in the case of permanently protected fauna). Section 34(3) of the Fauna Conservation Act should be amended to exclude the Palm Islands, Home Islands and Wellesley groups, Sweers Island, Raine Island, Lloyd Island and Torres Strait Islands from the definition 'sanctuary'.

#### **5. Advisory Bodies to Government**

The salaried and appointed Aboriginal and Islander Commission should be abolished. Not being an elected body, it does not enjoy the same confidence of communities as the elected advisory councils. For urban Aborigines and Islanders, an elected advisory body should be provided as for community residents. So as to avoid needless duplication, the Queensland government should recognise the National Aboriginal Conference and recognise its Queensland branch. If any recognition is contrary to government policy, an elected state-wide body should be instituted and provided with its own

secretariat. This body should be seen to be representative of the state's 58,000 Aborigines and Islanders.

The advisory councils should be reconstituted. The Aboriginal Communities Advisory Council should be constituted so as to give greater representation to the larger communities and to ensure that each community has at least two representatives. There could be provision for one delegate for every 500 residents, with a minimum of two delegates. This would mean a council of thirty-seven members, only four more persons than attended the last meeting of the council. The council should have an elected executive of five members which is provided with its own secretariat funded by the Bureau for Aboriginal and Islander Communities.

The legal ability of the council to convene its own meetings as at present under s. 33 Aborigines Act should continue and apply to the executive and any committees formed therefrom. Government policy should be amended to provide funds for such meetings when duly convened.

## **6. Market and Economy**

Community councils should be incorporated as at present. Provision should be made for a second corporation or co-operative in communities to conduct business including hotel, store-trading and, if sought by the trustees, housing. A statutory corporation should be set up which would be available to run community stores in the more remote communities under contractual arrangement with local communities. This corporation might also assume the duties, assets and liabilities of the Island Industries Board.

## **7. Departmental Structure**

Community councils should be eligible for membership of the Local Government Association once making the transition to a local government structure. Presumably, the federal government, by provision of funds and services through the Department of Aboriginal Affairs, will continue to give specialist assistance to Aborigines and Islanders on account of their race. There is no need for a large separate department at state level to do the same when its prime concern is now less than 15,000 people.

The proposed Bureau for Aboriginal and Islander Communities should be a sub-department charged with two tasks: co-ordinating the

delivery of services by the various specialist government departments to Aboriginal and Islander communities and liaising with the NAC, Advisory Council (or the Torres Strait equivalent, be it a Commission or whatever) and local councils.

The public servants on secondment to Councils such as Palm Island and Yarrabah during the transition period would be part of the bureau. The persons appointed by the Governor-in-Council to exercise specified powers normally appropriate to local councils in consultation with councils seeking a more gradual transition would also be from the Bureau.

## **8. Special Measures for Aborigines and Islanders on the Basis of Race**

Part IV of the Aborigines Act should be abolished and not replaced but for a transitional provision for those whose property is under management at a fixed date. Though no figure is publicly available as to amounts paid out for grants in aid in recent years, annual reports to parliament by DAIA indicate that the category of payments which includes Grants in Aid amongst other things declined from \$82,001 to \$10,815 over the past two years. Such minimal assistance could be provided from elsewhere.

The time for government to manage people's property other than through procedures set down by courts and the Public Trustee has passed; so, too, has the time for a public servant to judge a contract harsh and unconscionable and therefore voidable or variable by him on the basis that one of the parties is Aboriginal or Islander. Estates of Aborigines and Islanders who die intestate should be administered in the same way as the estates of other citizens.

The new legislation should not contain any special discriminatory provisions which apply on the basis of race unless those provisions have been sought by the State's Aborigines and Islanders. The recommendations for such provisions, if made by Aborigines and Islanders, should be tabled in parliament. In particular, Aborigines and Islanders living in their communities should be paid award wages and have full entitlement to union membership, workers' compensation, and conciliation and arbitration.

Canteens should be governed by provisions of the Liquor Act so as to ensure the health and safety of patrons. Restrictions on the supply, type, or

sale of liquor in communities should be primarily a matter for determination by the community and not the Governor-in-Council or the community council. Any restrictions should be instituted either by community vote or by determination of a tribunal having apprised itself of community views. To leave the decision to councils is to weigh them down with a time-absorbing question which risks creating alienation between council and community. The abridgement of individual rights for the community's good should be susceptible to full discussion by the community and a judicial process to weigh up the competing interests involved. Furthermore, as the Yarrabah community has submitted to government, it is community co-operation and not imposed legal restrictions which is needed to control alcohol abuse.

Once the media spotlight had moved from Brisbane at the end of the Commonwealth Games, the Queensland government and the National Party machine were more amenable to discussing these reform proposals. But some senior public servants were still smarting from the mortal blow delivered by the Aborigines at Bamaga to the government's preferred mode of consultation which excluded independent professional advisors and isolated Aboriginal reserve councillors from urban Aboriginal groups and their white supporters. Mr. Tomkins had given some silly interviews to the international media during the Commonwealth Games. The media pursued him on a ministerial fishing trip aboard the government's boat, the *Melbidir*, in the Torres Strait. He was dropped from cabinet before Christmas. His successor, Mr Val Bird, was anxious to clean up the mess. He was not so willing to do the bidding of his permanent head, Mr Pat Killoran.

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- 1 s. 118, Mining Act 1968.
  - 2 s. 128, Mining Act 1968.
  - 3 s. 129, Mining Act 1968.



# THE NATIONALS MOVE GROUND, 1983-1988

## 1. The Third Land Offer

The National Party machine was now prepared to consider the Land Act amendments on their merits despite Dr Edwards' assertion that advice from the Crown Solicitor and Solicitor General "did not agree"<sup>1</sup> with the opinion of C.W. Pincus QC published by the churches. Mr Bird was anxious "to meet with members of the various churches early in the new year to have discussions on their involvement in the welfare of Aborigines and Islanders in Queensland."<sup>2</sup> With a change of government in Canberra in March 1983, the Queensland government did not want it thought that their preparedness to amend the Land Act was in response to increased pressure from Canberra. In time, that pressure was to be perceived as bluff anyway. Mr Bird met with Archbishop Rush and myself on 8 March 1983. Next day he made ambiguous remarks on radio: "The churches themselves, who have played a very important role in the welfare of Aboriginal and Torres Strait Islanders over very many years, agree that they are far better off with land held under Deed of Grant in Trust than they are under freehold title. When the churches who have been so very close to them over the years also believe that that is the best possible protection they can have over that land, then who are we going to listen to."<sup>3</sup> The church leaders issued this statement:

Following statements yesterday by the Hon. V.J. Bird, M.L.A., Minister for Northern Development and Aboriginal and Island Affairs, we wish it to be understood that we have not endorsed any proposal made by any government for laws relating to Queensland's Aboriginal and Islander Reserves.

Furthermore, we do not see it as our function to endorse any legislation emanating from any source relating to Aborigines and Torres Strait Islanders. That is surely a matter for those Aborigines and Torres Strait Islanders who are to be affected by such legislation.

The Anglican and Roman Catholic Bishops of Queensland have said: "If Deeds of Grant in Trust are appropriate legal devices for the transfer of title (and that is for other, expert in the law, to determine), they should surely be created so that they might never be varied or terminated except by Act of Parliament."

We have already expressed our regret that the long published opinion of leading Queen's Counsel concludes that "no security is offered" under the Deed of Grant in Trust legislation.

Might we once again express our hope that whatever legislation is passed will give our reserve residents security and stability on their lands of historical significance.<sup>4</sup>

By 26 April, the premier supported a proposal that the land legislation be amended "to place the power of revocation of all, or any part of, such lands in state parliament." Mr Bird said, "The decision to seek the change was taken after lengthy consultation with Aboriginal and Islander leaders, heads of churches involved and the premier."<sup>5</sup> On 6 May, Mr Bird announced the cabinet decision approving the change. During his extensive tours of Aboriginal and Islander communities, councillors had expressed concern that a Deed of Grant in Trust could be revoked, or varied, before being considered by parliament. He said, "The general consensus among the people and organisations more closely involved in administration of these communities supports the need for change."<sup>6</sup>

The Palm Island working party was vindicated and the heads of churches' persistence justified. Things were never to be the same again after the Bamaga meeting of July 1982. Having received straight answers from Mr Wally Baker from the Lands Administration Commission, the Aboriginal leadership knew they were being offered less than adequate land tenure.

They voted against it and maintained their position despite a misinformation campaign by the Queensland government and cold comfort from Canberra. Bamaga, July 1982, was a turning point in government-Aboriginal power relations in Queensland. The Aborigines effected a change in government policy which was more than the fine print of land tenure. They also effected a change in style in the National Party government's dealings with them, especially after the dumping of Mr Tomkins and the later dismissal of Mr Killoran. Though there were still to be many abuses of consultation processes, never again could government divide reserve residents and their leaders from vocal urban Aborigines and Aboriginal supporters. Never again could government insist on exclusive access to people on the reserves. Never again could government brazenly misrepresent to the public what were Aboriginal aspirations and demands.

After the state election on 22 October 1983, Mr Katter became the new Queensland minister. He introduced the amendments to the Land Act on 16 December 1983. He said the new bill was designed "to further secure the legal tenure of the Aboriginal and Islander people who will hold in trust, under a deed of grant in trust, those areas presently reserved for Aboriginal and Islander community purposes". Mr Katter said the new legislation would "give to the Aboriginal and Islander residents right of occupation and land management for themselves and their children that are complete and beyond interference except by a special Act of the Parliament." For the first time a Queensland minister said he was putting forward proposals in the area of "Aboriginal land rights" and that the Government was giving a tenure over land "adequate for the real long-term needs of people on the Aboriginal reserves in Queensland, and also a refreshingly precise and forthright method of transferring control into the hands of the local people". Mr Katter conceded that the government would now be giving a "stronger legal tenure over land that they and their predecessors have occupied for many thousands of years". Cameron Forbes, the *Age* columnist, later wrote:

On 16 December last year, the sun did not pause in its course over Brisbane. Nor did birds fall stunned from the Queensland sky. This was remarkable, for on that day, Bob Katter, the Minister for Aboriginal and Island Affairs, stood in State Parliament and used with approval the phrase "Aboriginal land rights" when introducing legislation.

It is not recorded what Queensland's Premier, Mr Bjelke-Petersen, was doing or thinking at this time - Mr Bjelke-Petersen who had accused the Federal Government of fostering apartheid by granting land rights in the Northern Territory, who had said the push for land rights was being promoted by foreign forces trying to create a nation within a nation, and who was fervently integrationist, if not assimilationist, telling his European constituency that Aborigines should be Queenslanders just like you and me.

On the reserves, for decades places of crushing and often ruthless paternalism, there is a stirring of hope that the new legislation to be passed this year may match Aboriginal aspirations.<sup>7</sup>

The amendments were ultimately passed on 2 February 1984. The heads of churches once again sought and published an opinion by Mr Pincus QC. The Anglican and Catholic bishops of Queensland meeting in annual conference again published a statement:

At our annual conference two years ago, we, the Anglican and Roman Catholic Bishops of Queensland, discussed the Queensland Government's proposed use of Deeds of Grant in Trust to vest title of reserve lands for the benefit of the Aboriginal and Torres Strait Islander residents of the State.

We issued a statement expressing our hope that Aboriginal and Islander reserve residents would be offered security of tenure over their lands which would be guaranteed by Act of Parliament.

We said, "If Deeds of Grant in Trust are appropriate legal devices for the transfer of title (and that is for others, expert in the law to determine), they should surely be created so that they might never be varied or terminated except by Act of Parliament".

While continuing not to express any view about the appropriateness of Deeds of Grant in Trust, we are pleased to note the opinion of leading Queen's Counsel published today by our Archbishops and the Moderator of the Queensland Synod of the Uniting Church that lands granted in trust under the Land Act amendments recently passed by the Queensland Parliament will be 'as secure as if they had been granted by Act of Parliament' and that the amendments 'do in fact make an Act of Parliament necessary to revoke or detract from such grants'.

While welcoming the amendments to the Land Act might we again express our hope that there be full consultation with the people on the reserves and

their elected representatives as well as with concerned community groups in the preparation of the deeds of grant and the Services legislation which is to replace the Aborigines Act and the Torres Strait Islanders Act.<sup>8</sup>

In the preceding three years, the heads of churches were responding to an extraordinary challenge put to them directly by the Queensland government. While avoiding political involvement and legal analysis of their own, they had been anxious to ensure that security of tenure under the law be accorded to the state's reserve communities and that there be full and adequate consultation with those communities if special laws were to be made applicable to them on the basis of their race or residence status. They were not acting as representatives of the Aboriginal and Islander people but as pastors concerned for their welfare and as pastors of the community concerned for a more just society, and some may even claim, in the words of Mr Tomkins, "as moral and ethical authorities in Australian society".

## **2. Rushed Services Legislation**

Attention turned now to the services legislation and the fine print of the title deeds. Like Mr Bird, Mr Katter did not reconvene the AAC nor the Aboriginal working party which was to visit the communities. Instead a National Party parliamentary committee took to the consultation trail. On 23 March 1984, that Committee met with the Torres Strait Islander leaders and reported agreement on all the major principles in the proposed legislation. No such meeting ever occurred with the Aboriginal leaders. Instead, Mr Eric Law originally from Cherbourg was appointed special consultant to do the rounds of the Aboriginal communities. Mr Katter travelled extensively to the communities at this time. Having said, "no stone would be left unturned in efforts to find out what reserve people wished in the way of laws which will regulate their lives for many years to come", he refused to provide any details about the legislation, adding that "all information had been embargoed."<sup>9</sup> Though Mr Katter had said he was "more confident than ever that the Queensland Government's approach to the new legislation was in line with the needs and wishes"<sup>10</sup> of people, he was never able to tell people what wishes would be implemented and how.

On Wednesday afternoon, 11 April 1984 Mr Katter held a press conference at Parliament House and announced some detail of the

legislation. There were to be two pieces of legislation introduced but they had not seen the light of day. Mr Katter said they would be debated next day. Asked, "Does that give enough time for the Opposition to have a look at it?" he replied:

Let me state to you and I must emphasise this point. The Premier said to me that he wanted adequate consultation and in the last three months I think there have been very few pieces of legislation passed in this House that have been discussed more fully and frankly with the people themselves than this legislation. It has been anything but hurried.<sup>11</sup>

Asked when the Opposition would see the legislation, he answered:

The specific sections to the Bill will go into the House in an hour's time and the Bill can be read. I read it in the space of about 19 or 20 minutes last night. And there will be some 30 or 40 waking hours before that Bill is debated. And myself and Eric Law, and the other people on my committee that have been working extremely hard - The National Party Committee - they have averaged 3 and 4 hours sleep almost continuously for the last two months. I don't see why the Opposition shouldn't sacrifice a few hours sleep this evening.<sup>12</sup>

He claimed, "all of the clauses and the principles that are involved in that legislation have been discussed in very great depth by the people themselves."<sup>13</sup> After he had spoken, Mr Katter introduced a Torres Strait Island leader, Getano Lui Jnr, who later ran for the National Party in the northern seat of Cook. Lui said, "Its very much in line with what the people wanted and we have discussed it with the Minister in close consultation."<sup>14</sup> When asked if other people had seen it, he answered, "Not as yet, no. But being on the negotiating committee for this legislation and what we have expressed is the wish of our people." No other Aborigine or Islander had seen the legislation. He had just seen it for the first time, and reported: "It's in line with what we wanted in the Islands and Torres Straits where the Minister went around and sat amongst our people and consulted as to what we wanted to see in the legislation and we are having a formal meeting on Thursday Island with the Island leaders of fourteen different Islands, in which they all agreed. As I said I can't see really any doubts when they do

see it that they will have any problems with it, because I can see what we've discussed all along is contained in that legislation."

The legislative processes of the unicameral legislature followed. And as the sun rose on Friday, 13 April, the Queensland Parliament was still in session. It sat through the night to conclude a mammoth twenty-one hour sitting - believed to be an Australian record - during which time it debated and passed the Community Services (Torres Strait) Bill and the Community Services (Aborigines) Bill. Standing orders of the parliament had to be suspended to allow debate of the bills in such a short time. The Torres Strait Bill was introduced on Wednesday evening. Debate on that Bill commenced on Thursday night. That debate was interrupted after 10 pm to permit the introduction of the Aborigines Bill which was then debated between 7.30 am and 8.30 am on Friday. Sixteen Aboriginal and Islander reserve councillors were present in the public gallery during the debate.

The most significant new development contained in the bills was the granting of local government powers to the community councils. Introducing the Torres Strait Bill, Mr Katter claimed that these provisions would bring the communities into line with the rest of the state. Introducing the Aborigines Bill, he said, "This Bill reflects the Government's desire to unfetter Aboriginal and Islander people in formulating decisions which affect the development of their communities and which shape their future position in Queensland society". He asserted that the new laws would shift government decision-making powers to the local, democratically-elected community councils. No doubt these sentiments of Mr Katter were the wishes of the communities as communicated by their elected leaders. No doubt these were his intentions. But the community wishes and the minister's intentions were not realised in this legislation.

The bills contained a series of restrictions on community councils which did not apply to any other local councils in Queensland. They did not even apply to the Aboriginal shire councils of Aurukun and Mornington Island. Councils were to submit an annual budget to the minister who was empowered to reject it in which case any expenditure by the council would be illegal. Council chairmen were to submit monthly and annual financial statements to the minister. All items of expenditure by Aboriginal councils made from funds allocated by the Queensland Parliament were to be approved by a public servant. Council accounts were to be audited "as if the

council were a department of Government of Queensland." These councils were not viewed as responsible, elected councils expending their own funds, but as public servants expending government funds and therefore accountable to the Queensland government through its officers. The Under Secretary and minister were empowered to provide the councils with whatever departmental officers were necessary, in their opinion, to enable councils adequately to discharge these duties, and it was made an offence for any person, including a councillor, to obstruct these officers. This was not the stuff of self-management; it was not even local government; it was a continuation of government by the public service.

Mr Katter had meetings with the Aboriginal and Island leaders a month after the legislation was passed. He defended the consultation process in these terms: "I was appointed to the portfolio prior to the Christmas break and after cabinet resumed in mid-January there was a span of only three months in which to affect consultation and draft legislation."<sup>15</sup> But the Premier, Mr Bjelke-Petersen, had announced the repeal of the old Aboriginal legislation in October 1980. The Government knew then that its old legislation was to expire in May 1984. Since 1981, the Queensland government had been claiming to consult about the new legislation. The very tight time frame of the government's own making could have been as extended as three years if it had honoured undertakings about consultation. Obviously, Mr Katter found himself in the unenviable position of having to make up three years lost ground by his government and his department in three months.

According to Mr Katter's statement, his meetings held six weeks after the passage of the legislation fulfilled the premier's promise "that the process of consultation would be an ongoing one". They did not fulfil the premier's commitment that "before any draft legislation goes before parliament it will go before the advisory councils for discussion. The councils will have the opportunity to review proposed legislation". His statement did not explain the statement by his predecessor, Mr Tomkins, to Bishop Murray in September 1982 that "further meetings of the advisory councils to firmly base draft legislation are imminent". In fact, the Aboriginal Advisory Council did not meet between July 1982 and the date of the legislation's passage through parliament. Neither did it explain the Acting Premier Dr Llew Edwards' statement to Archbishop Rush in July 1982 that "the Government's intention is to produce information after



consultation which can then be tabled in the Parliament, if possible, to allow community comment and further consultation". For the government never tabled anything in parliament despite the fact that suitable materials were forwarded to the government in September 1982. Nor did it explain the government's treatment of the Aboriginal Advisory Council working party which was never re-convened after the government had circulated a list of their recommendations stating "the working party is still, however, considering these and other matters before framing final conclusions for consideration of the Aboriginal Advisory Council".

Mr Katter said that during his three months travel he and Eric Law had "asked everyone at the community meetings for their advice and what they wanted." He said: "They all demanded the immediate removal of the old Act. The general consensus was that if there were any deficiencies in the new legislation as a result of our tight time schedule, they could be dealt with by amendment during the next sitting of Parliament. I agreed to that principle. I have now taken the two bills back to the community leaders and I am very happy to say that whilst they have requested some administrative changes, they are happy with the Acts as they now stand."<sup>16</sup> However, the media release from the minister's office reporting these remarks did state that "community representatives had requested some changes to the legislation."<sup>17</sup> Commenting four days earlier on the "administrative changes" sought, Mr Katter said, "I hope we can deliver all these changes but they will not be easy."<sup>18</sup> The future and role of Mr Pat Killoran was being discussed by the minister and Aboriginal leaders at this time. The ex-minister, Charles Porter said, "Katter's barking up a dry gully if he thinks he'll freeze out Pat."<sup>19</sup>

### **3. The Commonwealth Stand-off**

Aborigines and their supporters received no consolation from the Commonwealth government in their attempts to have the services legislation improved or overridden. While in Opposition, Senator Susan Ryan, ALP Federal spokesperson on Aboriginal affairs, had introduced to the Senate a bill for self-management of the Queensland reserves and had sought the setting up of a joint Federal/State tribunal or judicial body to determine the areas of reserve land to be the subjects of deeds of grant in

trust. The ALP campaigned on a policy of land rights for Queensland communities.

On 8 December 1983, Mr Holding, the Commonwealth Minister for Aboriginal Affairs, made a long speech to the House of Representatives saying that it was not only possible but also necessary for the Commonwealth parliament "to restore to Aboriginal people a proper form of land rights throughout Australia". He said this was "the solemn duty of this Parliament". Referring to people on Queensland reserves, he said they were living on reserves "with colonial overseers and without title to their own land". Mr Holding asked the House to pass a resolution recognising the Aboriginal people's "rights to land" and the need for land "to be held under inalienable freehold title".

Mr Holding stressed that the "human rights of Aboriginal and Islander Australians must take precedence over 'State rights'."<sup>20</sup> Earlier in the year, the High Court of Australia, in the Franklin Dam case, had made clear the scope of the Commonwealth power to make laws relating to Aborigines. Mr Holding had promised national land rights legislation by August 1983. The Commonwealth government had not commented on the Queensland amendments to the Deed of Grant in Trust nor on the services legislation. When the services legislation was being introduced to parliament, Mr Katter taunted the Commonwealth with the observation: "It is my understanding that the Federal Government's attitudes have moderated tremendously. Now you know, we have been informed privately along these lines. It is the impression that I have got in discussions with Holding and far from criticising the Federal Government for it let me praise them. They have come around to Queensland's point of view in a very large number of areas and we think they are showing enlightenment in that movement."<sup>21</sup>

After meeting Mr Holding in Canberra in June 1984, Mr Katter added insult to injury publishing the claim that "Mr Holding had given him an assurance that there would be no attempt made by the Federal Government to override Queensland's Aboriginal and Islander legislation and administration."<sup>22</sup> Mr Holding again made no response. All was to be answered by national land rights. He was not even prepared to amend the Queensland self-management legislation introduced by the Fraser Government.<sup>23</sup> That law allowed Aborigines on Queensland reserves to apply for self-management under Commonwealth auspices. It was a piece of

armoury never used. Without amendments to cover communities living on deeds of grant in trust, the law became a dead letter because deeds of grant in trust were not defined as reserves in the Commonwealth legislation.

Any doubts Queensland Aborigines had in wondering if they were on their own in forcing changes in Queensland government policy were to be laid to rest in an address by Mr Holding at Rockhampton on 9 January 1985 (six weeks before the announcement of his preferred national land rights model). He said: "The need to find a balance between economic interests and Aboriginal rights still prevents us from putting principles completely into practice and acknowledging the long history of the Aboriginal struggle for justice, a struggle which for all its courage cannot succeed unless we are prepared to cede some of our power, some of our resources. While the Government is committed to the advancement of Aboriginal and Islander people, it recognises that the role of governments as agents for social change is limited. It is generally left to those with the greatest need to force changes in society's thinking and attitudes to gain their rightful place in that society."<sup>24</sup> So the newly constituted Aboriginal Co-ordinating Council set out to make a go of the Queensland legislative arrangements and to seek reform without hope or expectation of federal intervention.

#### **4. The Nationals' Final Land Offer**

The first Aboriginal councils were elected under the new laws in March 1985. Before the Aboriginal Co-ordinating Council (ACC) could meet for the first time after its new members were elected, further land amendments were introduced to Parliament. Mr Katter chose not to consult with the advisory councils because he "had heard from the Opposition members over a protracted period that the advisory councils were flunkies of the Queensland Government. Although I spoke to them, I really bypassed them and went out to the elected councils."<sup>25</sup>

The new legislation was a bold new initiative in Aboriginal land rights legislation. It provided Aborigines and Islanders on Queensland reserves the opportunity to acquire perpetual leases over their homes once deeds of grant in trust had been issued to the community councils for the community lands. It also allowed the issue of leases for a set period to residents for commercial and other purposes. As with the Community Services legislation passed under cover of night this new measure was

considered by the "Parliament of the Long Night" after midnight and before dawn. Its rushed passage required no fewer than fifteen amendments by the government on the floor of the House so as to make it comprehensible and workable. Further amendments were to be made to the land and services legislation. The legislative package by now consisted of ten Acts of Parliament passed between 1982 and 1988 - showing the gradual and sporadic shifts made from the policy position of March 1982.

Title deeds to all inhabited Torres Strait Islands, except Murray Island, were issued on 17 October 1985. On the same day his governor was signing the title deeds, the premier made a ministerial statement to parliament on "Ayers Rock and Land Rights." The Governor-General was to hand over the title of the Rock to an Aboriginal land trust representing traditional owners subject to a lease back to the National Parks and Wildlife Service. The premier said, "On 26 October 1985, our nation will lose a part of itself. On that day it is proposed to hand over ownership of Ayers Rock." Almost four years before the federal coalition went on to adopt the "one Australia" policy, the premier said: "We are all Australian. We are one nation - not a national divided by race. Any move towards the granting of Aboriginal land rights to one section of the community and the resultant creation of a nation within a nation should be opposed. The Queensland Government believes in equal rights - not land rights."<sup>26</sup> Capitalising on his opponents' assertion that the Queensland land deal was not land rights, he tabled the ANOP survey on land rights commissioned by the ALP, quoting the sentences: "The action (of the Queensland Government) is seen to have given acceptable security of tenure to those reserve lands where Aborigines have a legitimate claim to ownership. Even supporters of land rights feel that the Queensland Government has taken real steps in the right direction." Petersen said, "I suppose I should thank the Federal Government for financing a document that supports our policies and rejects theirs in relation to the correct method of approach in these matters".<sup>27</sup>

During the next week, the premier attended land handover ceremonies in the Torres Strait. Mr Killoran was not invited to accompany him. Administrative as well as legal changes were in train. Murray Island did not receive a land grant because Eddie Mabo and others had commenced litigation in the High Court of Australia in 1982 claiming traditional title. They claimed that their three islands had been continuously inhabited and exclusively possessed by their people. They claimed to have lived on the

islands in permanent settled communities with a social and political organisation of their own. They claimed that the annexation of their islands by the Governor of Queensland did not affect their land title. Even if the Queensland Coast Islands Acts passed by the Queensland Parliament in 1879 had extended the sovereignty of Her Majesty Queen Victoria to the islands, it did so subject to the continued enjoyment of their rights until those rights had been extinguished by a competent successor in title to Queen Victoria. Further they claimed that their rights had not been so extinguished. So they claimed continued rights recognised by our system of law.<sup>28</sup>

In April 1985 the Queensland parliament passed the Queensland Coast Islands Declaratory Act, innocuously described as an Act 'to allay doubts that may exist concerning certain islands forming part of Queensland'. In so far as the Act changed the existing law, it declared that 'upon the islands being annexed' in 1879, 'the islands were vested in the Crown in right of Queensland freed from all other rights, interests and claims of any kind whatsoever'. It provided that: "No compensation was or is payable to any person in respect of any right, interest or claim alleged to have existed prior to the annexation of the islands... or in respect of any right, interest or claim alleged to derive from such a right, interest or claim."<sup>29</sup> Introducing the legislation, the Deputy Premier said: "The passage of this Bill will, it is hoped, remove the necessity for limitless research work being undertaken in relation to the position of the relevant Torres Strait Islands prior to annexation and will prevent interminable argument in the Courts on matters of history."<sup>30</sup> In 1988 the High Court ruled that the Queensland legislation was invalid, being inconsistent with the Racial Discrimination Act. The Murray Islanders argued their traditional land claim in the High Court during the same week that the Goss government passed its Aboriginal land legislation in May 1991.

The processing of Aboriginal title deeds took much longer than the Torres Strait deeds because Aboriginal communities had far more government operations being conducted in their town areas, requiring detailed surveys and excisions. Public servants more sympathetic to a quicker transition to self-management were promoted in Mr Katter's department and Aboriginal members of the Palm Island working party came to play a significant role in the ACC. Roy Gray became chairman of the ACC; Don Fraser became director of the secretariat; Lester Rosendale became full time liaison officer between the minister and the ACC. Canberra officials

often thought the ACC too close to the Queensland government. It was the individuals who had stood up to the Queensland government in 1982 who came to a working relationship in effecting many of the changes.

The first Aboriginal title deed was issued for the Hopevale community in time for the premier to present it at the jubilee celebrations of the Lutheran mission. He had worked in setting up the mission before his entry to politics. Six of the communities received their title deeds the day before the Queensland election, on 31 October 1986. The Queensland National Party was not letting a chance go by. Mr Katter had to commute by helicopter so he could attend the handover ceremonies at both Palm Island and Yarrabah, the largest communities in Queensland. At Yarrabah, Roy Gray spoke at the handover ceremony in the Anglican church: "This is a great day; it is our day. It is the day when Yarrabah moves from politics and promises to land rights and self-management." The people's own bishop, Bishop Arthur Malcolm was presiding. Mr Katter paid tribute to the many "local heroes and martyrs" who had fought for the rights of their people. A minister of the crown, he acknowledged the theft and dispossession of land. Many of the congregation wore special T-shirts emblazoned with the Aboriginal flag and the words "Yarrabah, Deed of Grant in Trust, 31 October, 1986". Mr Gray said: "We have always belonged to this land. From today, we own this land, even in the eyes of our colonisers. From today, we manage this land for the good of our people. From today, our elected council makes the real decisions affecting and shaping the future of our community. Today is the end of a long struggle - a struggle for survival, a struggle for recognition, a struggle for dignity. In our hearts we thank our many community leaders and supporters who led this struggle. I and my fellow councillors are honoured to have built on the good work of those who went before us, and to have negotiated a good title deed from the Queensland government."

On Palm Island, Mr Tom Geia said: "The first attempt by the people of Palm Island to have some control over their own affairs was in 1938 when the first council was formed." Tracing the history of the struggle including the 1957 strike, he listed people who had contributed to the struggle for land and human rights and said: "To all who have supported our quest for land rights and self-management - this day belongs to you - you fought the good fight, not with violence, but with truth, until finally our aims were achieved." He said, "It is to the credit of Mr Katter that he was

able to arrange the process of development and finally the granting of the deeds of grant."

In 1982 the Queensland Government was refusing Mr Gray and Mr Geia the right to meet and discuss legislation. They were said to be creating trouble. Though elected representatives of their people, Mr Katter's predecessor, Mr Tomkins, had dismissed their request for regular meetings, telling Parliament: "If people wish to get together for meetings, they will not do it at the Government's expense." The troublemakers of yesteryear were now being hailed as "heroes and martyrs". Joy and pride in the achievement and the challenge of the future were expressed by all speakers. Roy Gray said: "Our destiny is now where it belongs - in our hands. The decisions will now be made by the right people - our people. From today, every Australian knows we belong here forever. This is our right. At last, the land has come back to us, its people. Today we celebrate our land and our life." On Palm Island, Tom Geia said: "My people let us go from here, united to develop our community into the paradise it should become, cutting away the legacy of our oppression. The land is ours - no-one can take it away. Let's use it to make a future for our children." Mrs Nellie Langlo, a Palm Island elder said, "This is a great blessing - not so much for us, but for our children." Aboriginal council clerk, Mr Len Malone, over a celebratory drink, recalled, "Martin Luther King said, 'I have a dream.' We had a dream. It has come true."

No sooner had the land titles been granted than there were rumours that the government was going to transfer the land into ordinary freehold so as to maximise the chances of Aboriginal communities joining the mainstream of Queensland urban and commercial life. Individuals would be free to sell their houses to outsiders and to alienate their community lands. Finally, Joh Bjelke-Petersen assured parliament "that nothing will be done without full consultation with the Aboriginal councils. It is extremely gratifying to know that at this stage the Aboriginal councils are very keen to stay within the DOGITs, which is a ringing endorsement of the policies of the Queensland government."<sup>31</sup> No further changes were made to the land title.

## **5. Negotiating a Better Deal on Mining**

In 1987, the Queensland government announced a major review of the Mining Act 1968. A green paper was published. The ACC put a detailed submission to Mr Brian Austin, the Minister for Mines and Energy. The green paper had made no mention of the fact that there were still some Queensland landholders who owned the minerals in their land. Some land titles granted under legislation in 1860, 1868, and 1872 included the ownership of minerals and the right to royalties. The ACC argued that DOGIT communities ought have the same rights to minerals as those landholders. Though details about such holdings were sketchy, Bjelke-Petersen had told parliament that there were eighty-four Queenslanders who received royalties for mining on their land in 1982-1983. The new mining legislation did not grant ownership of minerals to Aboriginal communities.

Prior to the Community Services Act 1984, the Director of DAIA had been trustee of Aboriginal reserves and, in that capacity, he had the power to negotiate a share in profits from mining on Aboriginal land. Failing the grant of royalties, the ACC argued for community councils being empowered to negotiate a profit share in mining, given that they were now the trustees of the land.

The ACC submitted the need for special legislative criteria "ensuring that Aboriginal communities will be compensated for the special damage they suffer by disturbance of their land and the introduction of a mining workforce close to a remote traditional Aboriginal community".<sup>32</sup> The government was not prepared to formulate special statutory criteria to cover social and spiritual disruption to land.

Under the old mining provisions, a miner could not enter private, improved land without the consent of the owner. The ACC argued that living areas, sites of significance and reasonable buffer zones about them ought be treated as private improved land for consent purposes. Exploration, prospecting or mining in such areas should not be permitted without the agreement of the local Aboriginal council. The ACC was agreeable to an exception being made if government decided mining was in the national interest. The ACC took issue with the underlying policy of the green paper that "To ensure that the maximum amount of land is available for mineral assessment and development, the determination of the most



appropriate land use at any given time should rest with the government and not with the party owning or controlling the land in question." They argued this policy was "contrary to self-determination and self-management by our people on their land".<sup>33</sup> If miners were to have access to Aboriginal land without local consent, the ACC argued for the right to have the matter determined by a court or an independent tribunal. The ACC proposed the creation of two classes of Aboriginal land:

1. Living area, sites of significance, and reasonable buffer zones (previously identified):

No mining activity or exploration without consent of local Aboriginal council unless the Governor-in-Council makes determination in the national interest, such a determination being subject to disallowance by Parliament.

2. Other DOGIT areas

In the absence of consent, the matter ought be heard by a mining warden with judicial independence or an independent arbitrator. The Governor-in-Council would have power to grant a permit, in its discretion, if the warden or arbitrator made a recommendation for mining. In any case, the Governor-in-Council could make a determination in the national interest, subject to parliamentary disallowance.

The ACC achieved a major breakthrough in convincing the National Party government that Aboriginal landholders should have more control over mining on their land than ordinary freeholders. Under the new Mineral Resources Act, freeholders could not withhold consent to mining except within confined areas around buildings. Aboriginal councils could withhold consent. Small prospectors and handminers would be excluded at will by Aboriginal councils. Councils could also refuse entry to explorers and larger mining concerns. If they did so, the matter could be reviewed by the warden's court which could make a recommendation to the minister. In the end the Governor-in-Council could override the Aboriginal council's refusal. The new and distinctive regime for mining on Aboriginal land was a great breakthrough in convincing the Nationals that justice did not demand treating Aborigines exactly the same as other landholders. Aborigines were granted more control over mining on their land than were most other freeholders in Queensland. The ACC's modest win was later to represent the high water mark of what the Goss government was prepared to concede to Aboriginal landholders.

## **6. Protection of Sacred Sites**

In 1986, the Nationals had decided to repeal the Aboriginal Relics Preservation Act of 1967 and to replace it with heritage protection legislation which could protect all Queensland's heritage under the same regime. This gave rise to a most convoluted law which was introduced to parliament in 1986, scrapped, reworked and then re-introduced to be passed as the Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987. Those who drafted the legislation went to great pains to omit all reference to Aborigines. Aboriginal rangers were to be replaced by "Landscapes Queensland Advisers". Aboriginal sites of significance could still be protected but as part of "Landscapes Queensland" which includes "areas or features within Queensland that have been or are being used, altered or affected in some way by man, and are of significance to man for any anthropological, cultural, historic or societal reason".<sup>34</sup> Aboriginal relics could be preserved as part of the "Queensland Estate" which "means evidence of man's occupation of the areas comprising Queensland at any time that is at least thirty years in the past", being of pre-historic or historic significance.<sup>35</sup>

The ACC members were very offended by this legislation. They passed a motion that it was "in bad taste to Aboriginal people".<sup>36</sup> The legislation provided for Regional Landscapes Queensland Committees. Senior public servants assured Aborigines that there would be at least ninety per cent Aboriginal representation on such committees overseeing the preservation of Aboriginal sites and relics. The ACC asked that the guarantee be placed in the legislation. It was not. The minister was given power to remove skeletal remains to the Museum. The ACC said their ancestors' remains "ought be treated with the reverence and respect accorded the remains of any other people in this land".<sup>37</sup>

Mr Katter argued that Aboriginal heritage protection was primarily a task for the Commonwealth government and that there was no point in the state government continuing a separate state regime for the Aboriginal heritage apart from that of other Queenslanders. Aboriginal rangers were transferred to the Department of Environment, Conservation and Tourism in January 1989. They were not given any specialist tasks relating to Aboriginal heritage. Most of them resigned in despair. Though the legislation allows for the appointment of advisory committees, no

Aboriginal advisory committee has ever been appointed despite the requests of the ACC.

## 7. Commonwealth Interference With Queensland Land Titles

The tensions between the black and green agendas in national politics came to a head with the Commonwealth's proposal to list the Queensland wet tropical rainforests on the World Heritage Listing. The largest single landholding to be affected was the Yarrabah Aboriginal community land. For a variety of reasons, none of which convinced the Minister for the Environment, Senator Richardson, the Yarrabah Council opposed the listing. The Commonwealth government treated Yarrabah like any other private landholder. There was no consideration for principles of self-management and self-determination. In June 1988 the International Union for Conservation of Nature and Natural Resources (IUCN) submitted its report on the proposed listing to the bureau of the World Heritage Committee in Paris. The IUCN said there would have to be clarification of "the position of the Aboriginal owners on the question of inclusion of their land" and that "further consultation is essential and in progress."<sup>38</sup> The Queensland government was opposed to the listing and was delighted to learn of Aboriginal resistance to the Canberra proposal. The Queensland Nationals were happy to assist members of the ACC travel to Paris to put their case.

The bureau requested the Australian authorities to provide information on "land ownership by Aboriginal peoples" by 1 October 1988. The international agencies were not happy at the idea of including Aboriginal land unless the owners were involved in and fully endorsed the aims of the Convention in their area as at Uluru and Kakadu. The chairman of the Yarrabah Council, Mr. Peter Noble, wrote to Senator Richardson on 28 June 1988, saying:

There is no way we could ever approve the inclusion of any of our land unless we were to receive satisfactory answers to our outstanding queries. Though the regulations will permit our continued traditional and community use of forestry resources, we would not be able to exploit commercially our forestry resources without your consent. You could grant such consent having regard 'only to the

protection, conservation and presentation' of the area. Your consent could be subject to judicial review instigated by outside lobby groups.

This potential interference with our rights to self-management and self-determination could not receive our agreement if there were no tangible benefits to be received by the community. If there be no tangible benefits and such potential interference with our land rights, we would have no option but to continue strenuous opposition to our lands being included in the listing.

We do not want to be made the meat in the sandwich in an ongoing Federal/State conflict. We hope you can come to Yarrabah soon to discuss these matters.

Thereafter, Senator Richardson did not meet with the Yarrabah Council until 18 October, a fortnight after he had provided the secretariat of the World Heritage Bureau with clarification of outstanding matters including, presumably, Aboriginal views on the listing. The council was not told what clarification, if any, had been provided. The senator was then to respond by letter to points raised by the council within a fortnight of their meeting. No response came. Commonwealth departments organised visits for Queensland Aborigines to Uluru and Kakadu. Bob Katter told the Queensland parliament: "Instead of the ALP fighting for the people of Yarrabah over the loss of their land due to World Heritage listing, the ALP was so terrified by the visit to Paris by ACC representatives that it paid for every single person of significance involved in Aboriginal affairs in north Queensland to visit Uluru and other places in the Northern Territory".<sup>39</sup> Eventually, Richardson wrote to the Yarrabah Council on 23 November, the last scheduled meeting date for the council to consider the listing before the World Heritage Committee's determination in Brasilia. Aboriginal concern with outside interference with their land rights went unheeded. Senator Richardson said Yarrabah would be subjected to "an overall management plan" and that the Government would be concerned if the council "proposed to undertake activities involving wholesale clearance of areas of rainforest or other threats to World Heritage values." Senator Richardson asked Yarrabah to provide "plans or details of future logging and possible expansion of sawmill operations," and "plans for outstation development." The carrots for agreeing to such interference in their affairs were to be: the money package "for assistance with private business initiatives which employ displaced workers"; the Senator's desire "to see a programme of

Aboriginal ranger training"; his foreseeing "employment opportunities for Aboriginals with the proposed Rainforest Authority"; and other programmes which "could also be examined which could identify additional employment opportunities for Aboriginals."

The Yarrabah Council then did a deal with the Queensland government. If Queensland would legislate to grant timber and quarry rights over DOGIT lands, Yarrabah would publicly oppose the Commonwealth's proposed listing. If granted full timber rights, Yarrabah would have much to lose from the listing. Without timber rights, Yarrabah's loss would be restricted only to timber used for local and domestic purposes. Bob Katter took the matter to Premier Mike Ahern immediately and agreed to make a ministerial statement in parliament the next day. He informed the House of "the government's intention to carry out in the autumn session whatever legislation or registration changes are necessary to ensure that the people have rights and controls over forestry and quarrying, and mining compensation rights similar to those enjoyed by other landholders in Queensland".<sup>40</sup> Having received the Queensland undertaking, Mr. Noble wrote again to Senator Richardson:

Basically, you have offered us nothing but the assurance that we will still be able to use our land as we do presently, if all goes well. The cost to us will be the uncertainty and time involved in gaining approval from outside bodies for our land use including outstation development.

The only things you have offered us in return for the interference with our land rights and self-management are the ability to apply for funds which are 'for assistance with private business initiatives which employ displaced workers' and a possible programme of Aboriginal ranger training. As you know, we will not have any displaced workers because we are not presently engaged in commercial logging. We will have our own ranger programme in place early in 1989.

We have not wanted to be involved in the public political debate about World Heritage Listing. We thought you would do more to consult with us. We thought you would have more regard for our land rights and self-management. The IUCN said further consultation was 'essential and in progress.' Yet you have never been here. You did not reply to our letter of 28 June 1988. No one addressed our concerns expressed in our submission to the Rainforest Unit dated 7 July 1988. We finally met with you on 18 October 1988,

only to find that our inclusion in World Heritage Listing was non-negotiable and that you had sent revised boundaries to the international committee on 1 October 1988.

You do not seem to understand that we as an Aboriginal community are sick of outside interference in our affairs. There is nothing in your proposal to help us. The interference in our local affairs will not be taken away by allowing one Aboriginal representative on the Consultative Committee.

Like our previous council, we oppose the listing of our land. If listed, it will be without our consent.

The Commonwealth proceeded with the listing of the Yarrabah land. Replying to public comment by Senator Richardson, Mr. Noble wrote again on 5 February 1989 reiterating Yarrabah's opposition to the listing, claiming that government consultation was "absolutely minimal" and "firmly oriented towards convincing us of the error of our ways". Senator Richardson made his first visit to Yarrabah on 8 August 1989. He and the council reached agreement on compensation and land management procedures, the list itself being non-negotiable. The council was satisfied with the package but the new chairman, Rev. Michael Connolly, expressed surprise that in the past when Yarrabah had pleaded for federal intervention against the Queensland government for self-management, "Canberra had its hands tied, but now, to save the trees, Canberra can sweep in and take over Yarrabah." Yarrabah had decided to "roll with the punches" because they had no choice.<sup>41</sup> One of the ironies of Australian politics was the central plank of the cheque book settlement of the environmental listing: the Commonwealth paid for the upgrading of the Yarrabah sawmill. Yarrabah's deal with the Queensland government provided the springboard for special measures in the Mineral Resources Act formulated in 1989 by the National Party. Furthermore it set a bottom line for timber and quarry rights in the Goss government's 1991 consideration of land rights legislation.

Though the Queensland Nationals were anxious to retain the rhetoric that they were treating Aborigines the same as all other Queenslanders, they were prepared to legislate selectively and to amend policy on the run so that Mr Katter could keep faith with the Aboriginal community leaders with whom he kept close contact.

- 1 L. Edwards to P. L'Estrange, 11 November 1982.  
2 V. Bird to author, 24 December, 1982.  
3 V. Bird, P.M., A.B.C. Radio, 9 March 1983.  
4 The joint statement of Archbishop Francis Rush, Archbishop Sir John Grindrod and the Rev. Douglas Brandon (Spokesman for the Moderator of the Queensland Synod of the Uniting Church), 10 March 1983.  
5 V. Bird, Press Statement, 26 April 1983.  
6 V. Bird, Press Statement, 6 May 1983.  
7 *Age*, 23 March 1984.  
8 *Catholic Leader*, 11 March 1984.  
9 R. C. Katter, Press Release, 2 March 1984.  
10 R. C. Katter, Press Release, 23 March 1984.  
11 R. C. Katter, Press Conference Transcript, 11 April 1984, p.4.  
12 *Ibid.*  
13 *Ibid.*, p. 5.  
14 *Ibid.*, pp. 8-9.  
15 R. C. Katter, Media Statement, 29 May 1984, p. 2.  
16 *Ibid.*, pp. 2-3.  
17 *Ibid.*, p. 1.  
18 R.C. Katter, Press Release, 25 May 1984.  
19 *Bulletin*, 22 May 1984.  
20 C. Holding, *Aboriginal Past: Australia's Future* (Canberra: AGPS, 1984) p. 14.  
21 R.C. Katter, Press Conference Transcript, 11 April 1984, p. 4.  
22 R.C. Katter, Press Release, 8 June 1984.  
23 *Aboriginal and Torres Strait Islanders (Queensland Reserves and Communities Self-Management) Act 1978.*  
24 C. Holding, *Address to Aboriginal and Islander Catholic Council*, 9 January 1985, pp. 3-4.  
25 (1985) 298 QPD 5259.  
26 (1985) 300 QPD 2072.  
27 *Ibid.*, p. 2074.  
28 *Statement of Claim, Mabo and others v Queensland & Commonwealth*, 20 May 1982.  
29 *Queensland Coast Islands Declaratory Act 1985*, ss. 3 & 5.  
30 (1985) 298 QPD 4741.  
31 (1987) QPD 615; 12 March 1987.  
32 R. Gray, Chairman, Aboriginal Co-ordinating Council, to B. Austin, 27 July 1987.  
33 *Ibid.*  
34 s. 5(1), *Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987.*  
35 *Ibid.*  
36 *Aboriginal Co-ordinating Council, Resolution 18*, 16 July 1987.  
37 R. Gray, Chairman, Aboriginal Co-ordinating Council, to Mr Smith, 17 September 1987.  
38 *International Union for Conservation of Nature and Natural Resources, World Heritage Bureau, 12th Ordinary Session, Documentation on World Heritage Properties (Natural) (Paris, June 1988) 11.*  
39 (1988) QPD 2292; 9 November 1988.  
40 (1988) QPD 3197; 24 November 1988.  
41 *Aboriginal Co-ordinating Council, Annual Report, 1988-1989*, p.12.

# THE NATIONALS' LAND RIGHTS LEGACY 1989

## 1. Land Titles

The original 1982 Queensland government policy was that any Aboriginal title to land was to be under existing provisions of the Land Act. Once the first set of substantive amendments were made, further suggestions for reform had a better chance of being treated on their merits. The result was five amending acts to the Land Act and another special act which provides a special regime for leases on Aboriginal land. So the relevant legislation was:

- the Land Act 1962-1988 as amended especially by the

- \*Land Act (Aboriginal and Islander Land Grants) Amendment Act 1982

- \*Land Act (Aboriginal and Islander Land Grants) Amendment Act 1984

- \*Land Act Amendment Act 1986 (No.2)

- \*Land Act Amendment Act 1987

- \*Land Act and Another Act Amendment Act 1988

and

- the Aborigines and Torres Strait Islanders (Land Holding) Act 1985

- the Aborigines and Torres Strait Islanders (Land Holding) Regulations 1986.



**(a) Aboriginal reserves**

Prior to deeds of grant in trust (DOGIT), the large Aboriginal communities lived on crown land reserved and set apart as Aboriginal reserves. Land set apart from such a public purpose remained crown land under the control of the government.<sup>1</sup> The Governor-in-Council could re-classify the public purpose for which the land was to be used. Such purposes could include aerodromes, port and harbour purposes, quarries, roads, and works for conserving water.<sup>2</sup> The Governor-in-Council could de-gazette a reserve at will rendering the land as vacant crown land for mining purposes or other development.<sup>3</sup>

Land reserved and set apart as Aboriginal reserve was often placed under the control of the Corporation of the Director of the Department of Aboriginal and Island Affairs (DAIA) as trustee. It could also be placed in trust to a church corporation owned by a church conducting a mission on the site. All such arrangements were variable and terminable by the Governor-in-Council at will. They did not entail any grant of land as the trustees were simply trustees of reserves.<sup>4</sup> A local authority would occasionally be made trustee of a reserve on the outskirts of a country town within the authority's local government area.

Prior to 1973, there were three ways of dealing with land under Part XI of the Land Act. The Governor-in-Council could reserve and set apart crown land for a public purpose. The Governor-in-Council could place land reserved and set apart for a public purpose under the control of trustees. And the Governor-in-Council could grant in trust land for a public purpose. The third was the preferred mode of dealing with Aboriginal land when the government first considered the matter in 1982. In 1973 special provisions were added to Part XI dealing with environmental parks. Land part of an environmental park would usually be de-gazetted only after the parliament had the opportunity to approve such action.<sup>5</sup> This added security provision contained many loopholes but it was still more than provided in other provisions of Part XI.

The Minister for Lands had power to grant fixed term leases (usually of 30 years duration or less but in some circumstances up to 75 years) over land reserved for a public purpose<sup>6</sup> Trustees could grant leases subject to approval from the minister who could refuse applications in his absolute

discretion.<sup>7</sup> Under Part XI, there was no security of tenure and control of land use rested with the minister.

### **(b) Deeds of Grant in Trust**

An Aboriginal deed of grant in trust (DOGIT) granted an estate in fee simple to the local Aboriginal council as trustee for the Aboriginal inhabitants of the area. Once land is included in a deed, the council holds a title which is freehold (described in the title deed as an estate in fee simple) and basically inalienable. The title deed signed by the Governor under the public seal of the State of Queensland is enrolled on the register of the Registrar of Titles under the Real Property Act. The Governor-in-Council can declare that the land revert to the crown only if "authorised to do so by Act of the Parliament that specifically relates to that land."<sup>8</sup>

The deed provides an upper limit of how much land can be reserved by the Governor-in-Council for public purposes. The proviso expressly states how much land can be resumed in the "community town area"<sup>9</sup> and elsewhere on community lands. The proviso does not describe or identify the areas which are subject to such reservation. It operates like a floating charge over the land.<sup>10</sup> The Governor-in-Council has no power to resume land "as land surplus to the requirements of the trust" unless such action "is approved by Act of the Parliament".<sup>11</sup> A council can agree to exchange DOGIT land for "land of an equal or greater area comprised in a reserve or road".<sup>12</sup> The title can be aptly described as inalienable freehold except that land of a stipulated area can be resumed for public purposes. These public purposes would usually be the provision of government services to the community, including education, health and police. But land could be resumed for public purposes unrelated to community concerns and without community consent.

Councils have obtained title to areas at least the size of the existing reserve areas in 1982. Included in the title are all "buildings or structures provided for the residence of Aboriginal or Islander inhabitants authorised to reside within the boundaries of the land".<sup>13</sup> Initially, the Commonwealth objected to the proposed handover of housing stock. The Queensland government unilaterally decided to hand over these houses to local councils. When the first deeds were issued on 17 October 1985, the Queensland government tried to appease the Commonwealth Minister for Housing who had adopted a wooden departmental approach by insisting on

local councils making undertakings that houses would be rented to local residents and, in the event that they were purchased, the proceeds would be dedicated by council to building new houses for rental.

Within old reserve areas there were still subsisting leases granted to Aboriginal residents and to others including churches and Commonwealth instrumentalities. Some leases were not part of the former reserves but were enclosed islands of crown lands inside a reserve's outside boundaries.<sup>14</sup> These fixed term leases of crown land were unaffected for their term by the issue of a deed. But the land becomes part of the deed automatically once the lease has expired. There is no provision of a covenant for renewal of such leases. Further leases could be obtained only from the council, and not from the government. Leases of areas reserved and set apart for public purposes<sup>15</sup> took effect as leases registered on the deed once it was issued.<sup>16</sup> The annual rent on these became payable to the local council upon issue of the deed.

The 1982 amendment permitted the specific exclusion of all crown improvements other than Aboriginal housing from a deed.<sup>17</sup> The land on which these improvements stood were created as reserves for public purposes under the control of the relevant government department or under the control of the Corporation of the Under Secretary for Community Services, as trustee. Such reserves could include "a reasonable area of land being the immediate environs of the improvements as excluded "as well as" adequate means of ingress and egress".<sup>18</sup> Schools, teachers' residences, hospitals, clinics, nurses quarters and residences and police stations and residences are excluded from the deeds. The DCS Administration office and DCS staff houses were specifically excluded in some of the earlier deeds issued.

Given the DCS commitment to scale down their departmental presence in the move towards self-management, there were problems and wastage in requiring specified and surveyed excisions for all DCS staff houses and other crown improvements. Pursuant to a 1985 amendment, crown improvements in use by the crown at the time a deed was issued were deemed to be excluded from a deed "unless such improvements and land have been expressly included in the grant in trust."<sup>19</sup> Under a 1986 amendment, streamlined provisions were enacted permitting ready inclusion of additional areas to an existing deed.<sup>20</sup> Aerodromes, landing strips, ports, stock routes, bridges and railways were usually excluded from a

deed.<sup>21</sup> So too were most roads and this resulted in their being public roads often contrary to the wishes of the local community. Some roads to shacks on outstations have been included in deeds rendering them closed to the public.

On 17 October 1985, DOGITs were issued for all fifteen inhabited Torres Strait Islands except Murray Island. Title was also to be granted to uninhabited islands, title being held by the Island Co-ordinating Council. No title was granted to Murray Island because Eddie Mabo and others were litigating their traditional land claim over the island in the High Court. The plaintiffs sought to restrain the Queensland Governor-in-Council from dealing with the land in any way. DOGIT boundaries were to comply with existing reserve boundaries as at 1982. A comparison of 1982 reserve areas and 1985 DOGIT areas in Table 1 reveals some discrepancies either way.

Table 1

	1985 DOGIT area <sup>22</sup>	1982 Reserve area <sup>23</sup>
Badu Island	10,200 ha	9148 ha
Boigu Island	6,630 ha	8296 ha
Coconut Island	44.6 ha	323.4 ha
Waraber Island	93 ha	64.7ha
Dauan Island	355 ha	323.7 ha
Hammond Island	1,660 ha	1,481.2ha
Moa Island:		14,568.7ha
Kubin Village	15,200 ha	
St Paul's	1,770 ha	
Mabuiag Island	626 ha	6,475.5 ha
Murray Island	-	485.6 ha
Saibai Island	10,400 ha	14,164 ha
Stephen Island	36 ha	323.7 ha
Sue Island	93.27ha	
Yam Island	45 ha	259 ha
Yorke Island	168 ha	129.5ha

Title deeds for Aboriginal communities were far more complex because of the need to excise land on which many government buildings were placed. In the Torres Strait most government infrastructure is based on Thursday Island and not on the outlying islands.

On 23 November 1982, the Queensland government admitted discrepancies between figures published in the annual reports of the Land Administration Commission and DAIA in relation to areas of land available to Aborigines. Mr Tomkins in his ministerial statement explained the discrepancies in this way: "The Land Administration Commission figures are in relation to land officially gazetted as Aboriginal reserve, whereas those listed in the annual report of the Department of Aboriginal and Islanders Advancement refer to all lands to which Queensland Aborigines and Islanders officially have permissive access, use and benefit. I regret that, rather than confirming or even apparently considering this possibility, the issue was used for political purposes."<sup>24</sup>

I had written to Mr Killoran on 25 October 1982 drawing the discrepancies to his attention and seeking any corrections or additions which needed to be made. None was received so I published my document on 4 November 1982 with this qualification: "While having made all efforts to ensure the accuracy of my research, I should state that I did not have the advantage of assistance from either State government department in preparing this document. On 25 October 1982, I forwarded a copy of a preliminary draft of the document to both departments seeking any corrections or additions which would be required. Having received none, I have revised the document after further research and now publish it, aware that it is not complete but trusting that it is more accurate and comprehensive than any other documentation publicly available." Table 2 sets out the various areas in question.

Table 2

	DOGIT area <sup>25</sup>	1982 Reserve area <sup>26</sup>	Previous DAIA reports <sup>27</sup>
Cherbourg	3,130	3,123.9	12,735 ha
Doomadgee	178,600	145,687.0	145,686 ha
Pormpuraaw (Edward river)	436,000	466,198.3	466,198 ha
Hopevale	110,000	104,016.5	104,016 ha
Kowanyama	252,000	258,999.0	258,999 ha
Lockhart River	359,685	316,520.4	313,388 ha
Palm Island	7,101	6,253.2	6,255 ha
Northern Peninsula Area		479,501.5	477,534 ha
Bamaga	6,660		
Seisia	178		
Injinoo	79,542		
Umagico	5,340		
New Mapoon	9,390		
Weipa South	200,730	124.2	354,828 ha
Woorabinda	38,811	21,760.0	21,760 ha
Wujal Wujal	1,102	114.5	116 ha
Yarrabah	15,609	15,450.9	15,450 ha

The major discrepancies which were of concern related to Cherbourg and Weipa. Cherbourg's reserve area was only one quarter of what was listed in DAIA annual reports. Mr Tomkins gave this explanation: "Cherbourg community has the use and access to a Forestry Reserve Area under a special arrangement. This is well known at Cherbourg and has not been a subject of complaint. The arrangement has existed for over 40 years." Cherbourg ended up with a deed for only 3,130 hectares.

The real problem area was Weipa South reduced 354,828 hectares to a mere 162 hectares in 1959 so as to provide Comalco with special bauxite mining leases. By 1976, the reserve had been reduced to 119 hectares. On 28 September 1982, Mr Killoran had said the Weipa community would get a grant to 750 acres (303.5 hectares). And yet, in debate on the Comalco Bill 1957, the Hon. H.W. Noble, Minister for Health and Home Affairs had said: "If the agreement is entered into there will still be a very large area of land remaining in the Weipa reserve, the minimum being at least 1,500 square

miles, in addition to the very large areas of Mapoon and Aurukun."<sup>28</sup> On 23 November, 1982, Mr Tomkins told parliament:

With the passing of the Commonwealth Aluminium Pty Ltd Agreement Act of 1957, the Aboriginal Reserve Weipa (R.4) under the trusteeship of the then Director of Native Affairs, was reduced in area from about 1,370 square miles to about 307 acres (124.2 ha). Subsequent excisions for school, church and other services have left a remaining reserve of about 119 ha.

A special bauxite mining lease was issued to Comalco by the Mines Department over those parts of the lands which formerly comprised the Weipa reserve R.4 and the Act provided for the surrender of land from the special bauxite mining lease in order that the lease did not exceed a certain area at specified times. No stipulation is made in the Act as to further assessment of the mineral potential. It is anticipated the bulk will revert in due course.

Rights exist over the mining leases not being actually utilised for mining purposes and, as well, pastoral activities are conducted on them by the Weipa community.

After John Pilger's documentary "The Secret Country" was screened in Australia, Mark Rayner, the managing director of Comalco complained that the review of the film perpetuated "the long discredited claim that the Mapoon Aboriginal mission was closed to make way for Comalco's bauxite mining activities". Rayner was right when he refuted the assertion "that the Mapoon mission was closed to enable Comalco to mine there". But he did paint an incomplete picture. In 1959, Comalco was granted special bauxite mining leases over a large part of the Weipa Aboriginal reserve which is south of Mapoon. To accommodate Comalco's interests, the Queensland government, without compensation, reduced the area of the Weipa reserve from over 354,000 hectares to a mere 124 hectares. The Queensland government continued to misrepresent to parliament the area of the Weipa reserve until November 1982 when the then Minister for Aboriginal and Island Affairs admitted a discrepancy of over 354,000 hectares. Though Comalco had surrendered much of that land back to the crown, it was never regazetted as an Aboriginal reserve. So the Weipa Aboriginal community of 537 people was to be eligible for a deed of grant over fewer than 124 hectares. By comparison, the Edward River Aboriginal community of 445 people to

the south on the peninsula was entitled to a deed of grant over 466,000 hectares. The only difference was that bauxite had not been discovered at Edward River. Though Comalco had contributed to the Weipa Aboriginal community under its good neighbour policy, neither Comalco nor the Queensland government had compensated the Weipa Aboriginal community for the land it lost in 1959 and which, but for its mineral potential, would have been included in the long promised deeds of grant in trust.

The Weipa deed was delayed until 27 October 1988 and after protracted negotiations, it covered an area of 200,730 hectares which, though an improvement on 100 or 300 hectares, was still a remarkable shortfall from the 354,000 hectares which had been gazetted as Aboriginal land before Comalco's arrival in Cape York. The boundaries of the Weipa deed were further complicated and restricted by virtue of the strange boundaries drawn for the 50 year lease to the south for Aurukun. The Mapoon community to the north of Weipa was later granted title to some of the old Mapoon mission site. There is still a need to identify the appropriate Aboriginal land holding groups of the Aboriginal reserve land north of Mapoon all the way up to the tip of Cape York, only some of which has been divided amongst the Aboriginal and Islander communities of the Northern Peninsula Area.

By the time deeds were issued in some cases, the Queensland government was happy to include additional areas. So the Doomadgee community obtained title to the old Bayley Point reserve on the Gulf of Carpentaria. The Palm Islanders received title to Great Palm Island and nine other islands in the Palm group, three of which had not been gazetted as Aboriginal reserves. The Palm Islanders' most significant gain was Fantome Island which had been the location for a leprosarium in earlier years. Gazetted for health purposes and departmental and official purposes, it was still included in the deed because of its historical significance to Palm Islanders. Many of their ancestors are buried there. Woorabinda Council was granted additional title to four grazing blocks at Foleyvale, Duaringa, Sorrell Hills and Zamia Creek. These properties had been used by the department for fattening cattle brought down from reserves in Cape York. The handover of these properties has provided Woorabinda with a land base for a viable cattle enterprise. The land locked community at Wujal Wujal was granted title to the only remaining unowned land in the area, tripling their holding.



**(c) What is in a Deed of Grant of Land in Trust?**

A deed of grant signed by the Governor states: "We, with the advice of the Executive Council of Our State of Queensland, and in pursuance of the provisions of section 334 of the Land Act 1962 do hereby grant in fee simple unto" an Aboriginal council in trust, "ALL that Parcel of Land in Our said State described in the First Schedule hereto and delineated on plan registered in the Department of Mapping and Surveying and having Catalogue Number as stated in such First Schedule." The deed then sets out what is excluded from the grant:

1. a) improvements within the boundaries of the land, the subject of this grant, which improvements were, at the time this grant was made, being used by or on behalf of a prescribed person, as defined by section 334F of the Land Act 1962-1986, for any purpose, together with the land on which the improvements stand and the land that is, at the time this grant was made, being used by or on behalf of such a prescribed person in connexion with the use of those improvements other than land so used for pastoral or agricultural purposes;

b) land within the boundaries of the land, the subject of this grant, which land first-mentioned in this paragraph (b) is, at the time this grant was made, being used by or on behalf of a prescribed person as defined by section 334F of the Land Act 1962-1986, for any purpose other than a pastoral or agricultural purpose; and

c) adequate means of ingress to and egress from the improvements and land referred to in paragraphs (a) and (b) above.

except such improvements and land expressly included in this grant in trust and specified in the Third Schedule hereto:

2. Any land included in this grant in trust over which a lease is granted pursuant to section 9 of the Aborigines and Torres Strait Islanders (Land Holding) Act 1985 but only while that lease remains in force, details of those leases granted, and dealings on those leases, being recorded in registers kept under the Land Act 1962-1986.

The deed is issued subject to the Trusts, Reservations and hereinafter specified, and to the Exclusions specified in the Second Schedule hereto and such other Reservations and Conditions as may be contained in and declared by the Laws of Our said State and in particular to the provisions of the Community

Services (Aborigines) Act 1984 and the Aborigines and Torres Strait Islanders (Land Holding) Act 1985 and to any regulations under those Acts.

The schedule of trusts has only one entry: "The grantee to hold the said land in trust for the benefit of Aboriginal inhabitants and for no other purpose whatsoever." The specified reservations in all deeds of grant in trust are:

- 1.(a) All minerals (as defined by the Mining Act 1968-1983) on and below the surface of the land; and
  - (b) The right of access for the purpose of searching for and working any mines (as defined by the Mining Act 1968 - 1983) in any part of the land.
- 2.(a) All petroleum (as defined by the Petroleum Act 1923-1986) on or below the surface of the land; and
  - (b) All rights of access for the purpose of searching for and for the operations of obtaining petroleum in any part of the land, and all rights of way for access and for pipe-lines and other purposes requisite for obtaining and conveying petroleum in the vent of petroleum being obtained in any part of the said land.
- 3.(a) All forest products and quarry material (as defined by the Forestry Act 1959-1984) above, on or below the surface of the land;
  - (b) The right to enter and re-enter for the purpose of establishing and carrying on such operations and works as the Conservator of Forests thinks fit for the getting and selling of forest products and quarry materials (as defined by the Forestry Act 1959-1984) in any part of the land.

Each deed also reserves a stipulated area of land, whether in separate parcels or in whole, to the crown for public purposes. That stipulated area is divided into two areas: land within the recognised community town area and land outside such an area. For example, in the case of the Yarrabah deed, the crown was entitled to resume up to 120 hectares for public purposes, 15 hectares of which could be resumed from the town area and 105 hectares from outside the town area. By such a deed, the Governor-in-Council grants land in fee simple to an Aboriginal Council in trust for the benefit of the Aboriginal inhabitants. The land granted is described in the first schedule. Excluded from the land described are the roads which are public roads and the lots listed in the second schedule.

The lots listed are generally gazetted as reserves under the control of various government service departments (health, education and police) as well as DCS which maintains substantial staff housing and some enterprises. With the transition to self-management, DCS staffing is being reduced. If staff houses are not required by other government departments they are then to be included in the deed. Enterprises such as the community store have not been handed over to the council but residents have been invited to submit expressions of interest and to lease such enterprises from the crown.

The deed does exclude land being used for other than pastoral or agricultural purposes by government departments even if the lots are not specifically listed. These implied exclusions operate by virtue of s. 334F, Land Act which was added to the Act in 1985. No sooner was it added than the Lands Department decided not to rely upon it and to make an exhaustive list of crown exclusions anyway. Leases of crown land within DOGIT boundaries and covered by s.203(a) Land Act at the time of grant are excluded from the deed but only for the term of the lease. Rent remains payable to the crown. These are usually leases held by statutory corporations like Telecom. Once a qualified resident has been granted a lease over DOGIT land under the Land Holding Act, the land is excluded from the deed but only for the term of the lease. Through an oversight in the legislation, there was provision made for reversion of the land into the deed upon forfeiture of a lease but there was no statutory provision for reversion once a lease had run its term. However every deed stipulated that land subject to Land Holding Act leases was excluded from the deed "only while that lease remains in force". Rent is payable to the council but forfeiture of the lease remains the prerogative of the crown.

Aboriginal housing is expressly included in the deed. Leases current at the time of grant but covered by s.203(b), Land Act are included in the deed. Rent is payable to the council. These are usually leases held by churches or residents. In some cases, enterprises such as pottery and sawmill have been expressly included under the third schedule.

Minerals, petroleum, forest products and quarry material and right of access to same were reserved to the crown. The crown retained the power to resume limited amounts of land for public purposes which would usually, but not necessarily, be restricted to provision of more government services to the community or to construction of more roads. No special conditions have been attached to any deed.

#### **(d) Mineral rights**

Under the 1968 Mining Act, DOGIT land was classed as reserve land, except that the Governor-in-Council, whose approval was required before any mining tenement or authority to prospect could be granted, could not give such approval before having "regard to the view of and any recommendation made by the trustee of the land in question".<sup>29</sup> All minerals and petroleum were excluded from the deed of grant. Prospectors and miners with the relevant entitlement could not be refused access by the local council nor by local residents. On 24 November 1988 in a ministerial statement to parliament Mr Katter gave an undertaking that the government would introduce legislation granting DOGIT communities "mining compensation rights similar to those enjoyed by other landholders in Queensland".<sup>30</sup> Towards the end of their term in government, the Nationals prepared new mining legislation which, with minor amendments, was re-enacted by the Goss government.

#### **(e) Ancillary rights : timber, quarry, fishing and hunting**

Timber and quarry materials are presently excluded from deeds of grant. The Forestry Act had to be specially amended in 1982 to effect the exclusion.<sup>31</sup> However a council may authorise the use or removal of timber and quarry materials for use in the area or "for the purpose of improvement of the area".<sup>32</sup> Local residents cannot be prosecuted for taking forestry products or quarry material within the area for use within the area. This immunity does not extend to authorising the sale or disposal for gain of such products or material.<sup>33</sup> In his November 1988 ministerial statement, Mr Katter also guaranteed rights and controls over forestry and quarrying "similar to those enjoyed by other landholders in Queensland".<sup>34</sup>

A community resident cannot be prosecuted for "Taking marine products or fauna by traditional means for consumption" by residents.<sup>35</sup> Once again, this does not authorise sale or disposal for gain of same.<sup>36</sup> Under the 1976 Fisheries Act, Aborigines and Torres Strait Islanders living on reserves, including DOGIT lands, are exempt from the restrictions on taking fish and marine products. Like others, they are not permitted to use unapproved noxious substances or explosives. The Fishing Industry Organisation and Marketing Act 1982 also provides for community fishing licences which permit an Aboriginal community to apply for a commercial fishing licence.

**(f) Council control of access to land**

Generally roads are not included in the deed and are therefore open to the public. Members of the public are entitled to enter trust areas and to be in any public place, road, park or other place of public resort or any place of business.<sup>37</sup> They may enter other areas of the community lands at the request or as a guest of a community resident.<sup>38</sup> Any person who is a member of the local Aboriginal community may enter and reside in the area.<sup>39</sup> Public servants and others with statutory tasks to perform may also enter and reside in the area.<sup>40</sup> Preachers, politicians and their entourages may remain in an area for as long as they require to perform their task.<sup>41</sup> A council can make by-laws authorising entry and residence of persons and excluding or restricting access to trust areas.<sup>42</sup> Anyone aggrieved by restriction or exclusion is entitled to written reasons from the council.<sup>43</sup> Unauthorised persons may be removed by council order. Queensland police or others acting on such a council order may use reasonable force.<sup>44</sup>

A council does not have an unfettered power to exclude outsiders from the community. It has power to protect community lands while access to the town area is the same as for any country town. Residents have the right to invite outsiders in but the council has control of residence on community lands. A council cannot permit any person to occupy or use any land for any purpose inconsistent with the benefit of the Aboriginal inhabitants.<sup>45</sup> A person occupying land for more than one month must be a member of a household subject to a tenancy arrangement with the council.<sup>46</sup>

**(g) Leases**

Members of an Aboriginal community who are over 18 years of age and are resident there "in the opinion of the Aboriginal council" may be granted land leases by the council.<sup>47</sup> So too may any incorporated body comprised of such persons only. A resident can apply to the council for a perpetual lease of an area provided the residents' total holding under perpetual lease does not exceed one hectare. Perpetual leases are intended for private dwellings and enterprises. A resident may apply for fixed term leases over greater areas. Generally land leased to qualified persons must be used for purposes consistent with the purposes of the trust which is "for the benefit of Aboriginal inhabitants and for no other purpose whatsoever".<sup>48</sup> Upon recommendation by the Minister for Lands, the Governor-in-Council may

approve a council granting a lease to a qualified person "for a purpose other than the public purpose for which the land was so granted".<sup>49</sup> In such a case, the lessee may not erect any structural improvements on the land.<sup>50</sup>

An application for a lease is lodged with the council.<sup>51</sup> After tabling an application at its next meeting, the council must then exhibit the application in a public place for twenty-eight days allowing time for objections. Objections need not be in writing. An objection may simply inform the council clerk of the person's desire to state an objection. An objector is guaranteed at least fifteen minutes in which to put their case at a council meeting. Within ten days after the expiration of time for objections, the council makes its determination.<sup>52</sup> The decision then being communicated to the applicant within seven days.<sup>53</sup> If the application is refused, the council must inform the applicant in writing of the grounds for refusal. A qualified person aggrieved by a council decision may appeal to the Appeal Tribunal<sup>54</sup> which is chaired by the visiting justice who is accompanied by two residents.<sup>55</sup> The tribunal conducts a hearing *de novo* and determines the matter "as if it were the Trustee Council to which the application was made."<sup>56</sup>

In deciding applications, a council and the tribunal must have regard to three factors:<sup>57</sup>

1. security of tenure for qualified persons of land occupied or used or sought to be occupied or used by them;
2. the social and economic development of the trust area within which the land in question is situated and of the community of qualified persons therein; and
3. the interest of the community of qualified persons resident in the trust area in the use made or to be made of land within the trust area.

After a council or the tribunal has decided to grant an application, it notifies the Minister for Lands within twenty-eight days whereupon the minister, within twenty-eight days, must inform the successful applicant "that an appropriate lease is in the process of being issued".<sup>58</sup> That process can then take a couple of years. Any instrument of lease issued notes that only qualified persons may hold such a lease and that "any provision... that purports to dispose of such land or an interest in such land (other than by way of a mortgage charge) to a person who is not a qualified person is void".<sup>59</sup> Since the passage of the Land Holding Act in 1985, not even the crown has power to grant leases of DOGIT land to unqualified persons.

Previously fixed term leases could be granted to outsiders provided the council and minister agreed.<sup>60</sup>

A resident leasing land may lease and purchase during lease the structural improvements on the land including what was departmental housing. Rent for the land is payable to the council and levied at 0.5 percent of the annual general rate for the land.<sup>61</sup> Rent of a house is also paid to the council and the resident has the option of having rent payments deducted from the purchase price of the house.<sup>62</sup> Even if that option is not exercised, the lessee is subjected to financial obligations of a kind unknown in usual residential tenancy provisions. But for fair wear and tear and damage by fire or act of God, the lessee and not the council is liable for repairs.<sup>63</sup> In his second reading speech, the minister justified this provision by saying: "Aboriginal people will now be responsible for the maintenance of their own homes and residential blocks. Up to date the people who paid rent regularly and looked after their homes were subsidising a group of irresponsible people who knocked their houses around and were notoriously late with rent payments."<sup>64</sup> This was no justification for a provision transferring the responsibility of repairs from an owner to a non-purchasing lessee. Consider the case of a house wilfully damaged by a trespasser. Why should a mere lessee pay the damage, rather than the owner of the house? Lessees are also obligated to insure council houses.<sup>65</sup> Though these onerous provisions have not been enforced, there is a need to restrict their legal application to lessees who are actually in the process of purchasing homes on terms. Once an application for a lease has been approved by a council or tribunal, the land reverts from the deed to become crown land again but only for the purpose of issuing a lease and only for the term of the lease.<sup>66</sup>

These lease provisions do provide a basis for local control of commercial enterprises on community lands and for private control and ownership of residential lots and houses in town areas on reserves. The provision of an appeal tribunal avoids the problem of absolute power being vested in the council of the day and overcomes the paternalistic provision that the minister's permission be obtained in every case. Though a council must take into account social factors, there may be pressure put on a council and the community to open up vast areas of their traditional lands to commercial activity to the profit of some individual residents but perhaps to the loss of members of the community who want areas set aside undisturbed

for traditional activities of Aboriginal life. It is yet to be seen whether this legislation has struck a suitable balance in this regard. The legislation is a bold new initiative in land rights legislation and thus entails risk. It is to be hoped that the risk has been voluntarily assumed by Aboriginal communities or, at least, by their elected representatives on their behalf.

The boldness of these provisions is evident when compared with the equivalent Northern Territory provisions and the views espoused by Justice Toohey. In his review of the Northern Territory legislation, Justice Toohey accepted as a fundamental principle that Aboriginal land ought to be held under inalienable freehold title. He said, "Any dealing that effectively alienates Aboriginal land, though not transferring title, is contrary to that principle. A lease or licence for an unduly long term may offend the principle, hence the justification for ministerial consent." He concluded that it would be "reasonable to permit a land council, without ministerial consent, but meeting its obligations under (the Act) to grant a lease or licence to an Aboriginal, Aboriginal council or Incorporated Aboriginal Association for a term not exceeding 21 years and to any other person for a term not exceeding ten years".<sup>67</sup>

When the Land Holding Act was introduced, the National Party government espoused a free enterprise policy based on individual initiative for Aboriginal communities and entertained the hope that the legislation would allow "individuals and communities (to) move towards self-sufficiency through private enterprises based on this (land) resource".<sup>68</sup> Fortunately, the rate and direction of this move is determinable by the community council and the appeal tribunal any decision of which requires support from the local resident members in order that it be carried. The inevitable cost of individual use and ownership of land is the loss of communal title and control of areas so affected. The cost of mortgagability and transferability for economic gain is the reduced guarantee of inalienability. For Aboriginal communities having spiritual responsibilities for traditional lands, this is a high cost. Thus it is essential that the checks and balances in the legislation and its mode of administration ensure that the decisions are made with due regard to these responsibilities without undue pressure from government or other outside interests who stand to gain commercially.

The Land Holding Act has very detailed provisions relating to forfeiture of leases. Non-payment of rent for two consecutive years renders



a lease liable to forfeiture at the option of the crown. Once the prescribed notices have been issued and no payment is received within ninety days, the mere acceptance by a council of rent arrears does not operate as a waiver. The minister may still proceed with forfeiture.<sup>69</sup> If a council thinks a lessee is no longer a qualified person, the council may call upon the lessee to show cause and thereafter direct the lessee to dispose of the tenement to a qualified person within twelve months.<sup>70</sup> The council may then refer the matter for investigation to the visiting justice who reports to the Minister for Lands. The Governor-in-Council is then empowered to forfeit the lease upon receipt of a recommendation from the Minister for Lands. A council may institute a similar process for forfeiture on the grounds that land has been unoccupied<sup>71</sup> or, in the case of leases for commercial purposes, that there has been "insufficient development work or utilization"<sup>72</sup> during the preceding two years. The final decision always rests with the Governor-in-Council.<sup>73</sup>

#### **(h) Council power to mortgage community lands**

The Governor-in-Council may by Order in Council grant a council the liberty to mortgage DOGIT land.<sup>74</sup> However this is probably not a commercially viable option given that upon foreclosure "the mortgagee shall not sell the land until payment shall have been made to the minister of the amount of the unimproved value of the land".<sup>75</sup> In the future, the limited possibility for mortgaging may permit economic development by communities under the auspices of the Commonwealth's Aboriginal and Torres Strait Islander Commercial Development Corporation.

#### **(i) Surrender of community lands**

Under the general provisions of the Land Act relating to trustees, a council may, with the approval of the Governor-in-Council, surrender and transfer DOGIT land to the crown. With approval from the Governor-in-Council, a council could also transfer its estate to a local authority or another body corporate. There is no general power of sale or transfer.<sup>76</sup> So as to exchange land granted "for land of an equal or greater area comprised in a reserve or a road", a council may surrender title for the issue of a new title.<sup>77</sup> With the written approval of the Minister for Lands, a council may also grant an easement over community land.<sup>78</sup>

**(j) By-Laws**

A council has very broad by-law making power both as trustee under the Land Act and as local government under the Community Services Act. By-laws have to be approved by the Governor-in-Council. Under the Land Act, a council may make by-laws protecting the land from trespass, injury or misuse and regulating the use and enjoyment of the land.<sup>79</sup> Under the Community Services legislation, a council may make by-laws for the peace, order, housing and welfare of the area and for the planning and development of the area.<sup>80</sup>

**(k) Industrial land-usage**

Qualified persons have been encouraged by the Queensland government to lease their own plot of land and to develop their own enterprises. Trying to escalate the process, the government on occasions even excised land areas from proposed community grants and granted fixed term leases to Aboriginal residents before issue of community title deeds.<sup>81</sup> Once deeds have been issued, individuals have had to deal with councils which have been very slow and uncertain in their processing of lease applications.

A lessee may sublet and a sub-lessee may sub-sublet whole or part of the holding to another qualified person provided prior approval in writing has been obtained from the Minister for Lands and the Minister for Community Services.<sup>82</sup> Presumably approval for a perpetual sub-lease would not be granted if a qualified person's aggregate holding were to exceed one hectare.<sup>83</sup> Similar provisions apply to transfer of leases and sub-leases.<sup>84</sup>

No ministerial approval is required for a qualified person to mortgage their holding. However mortgages must be registered with the Department of Lands.<sup>85</sup> Upon default, the mortgagee may take possession but must inform the Minister for Lands within 30 days.<sup>86</sup> The mortgagee is entitled to remain in possession "for such period only as is reasonably necessary to permit his disposal of the tenement to a qualified person and in no case shall he remain in possession thereof for longer than 12 months."<sup>87</sup> Obviously there will be little incentive for traditional lending institutions of security of tenure and ultimate community control of Aboriginal land, the Aboriginal and Torres Strait Islander Commission ought to be able to enter into such mortgages.<sup>88</sup> The Minister for Lands may approve an easement or

right of way affecting any leased land whereupon it is registered and noted, thereafter being an encumbrance that runs with the land.<sup>89</sup>

Lessees purchasing houses on their land do so at a price and on terms and conditions agreed to by the council and the lessee and approved by the Governor-in-Council.<sup>90</sup> Houses constructed under the Commonwealth-State Housing Agreement are still a problem because the Commonwealth insists on payment of market price or replacement value. Houses built on inalienable land and available for use only by qualified residents who have never previously had the opportunity or resources to purchase houses do not have an ascertainable market value. So the Commonwealth has tried to insist on replacement cost which in remote places is prohibitive and, in the case of old houses, unrealistic. The Queensland government for its part was prepared to relinquish all housing stock to councils and to stipulate an affordable price for transfer to individual ownership.

### **(l) Ministerial control**

The above analysis reveals that there is still a residue of ministerial control and supervision of councils' and residents' dealings in DOGIT land. Though the title is inalienable, an elected community council can be removed as trustee "if the Governor-in-Council is of opinion that it is in the public interests or that there is any other just and sufficient reason".<sup>91</sup> Originally dealings with DOGIT land were to be governed by Part XI of the Land Act which "severely limits the powers of trustees"<sup>92</sup> and which resides vast powers and discretion in the Minister for Lands. Later amendments and the totally new Land Holding Act of 1985 set up a completely new regime for land dealings which markedly reduced the scope of ministerial control.

## **2. Self-Management**

Under the National Party government, DOGIT communities were subject to the Community Services (Aborigines) Act 1984<sup>93</sup> as amended by the Liquor Act and other Acts Amendment Act 1985<sup>94</sup> and the Community Services (Aborigines) Act Amendment Act 1986.<sup>95</sup> In pursuance of the provisions of the principal act, the Governor-in-Council made the Community Services (Aborigines) Regulations 1985<sup>96</sup> which were supplemented by further regulations in 1987.<sup>97</sup> The principal Act repealed the Aborigines Act 1971 which was an Act "to provide for the conduct of reserves for Aborigines and

for the admission thereto of persons who wish to reside there; for the grant of assistance to Aborigines who seek it."<sup>98</sup> The new legislation marked a change of policy. According to its preamble it was an Act "to provide for support, administrative services and assistance for Aboriginal communities resident in Queensland and for management of lands for use by those communities."

However some of the earlier colonial and paternalistic provisions were retained. There was still provision for a visiting justice to visit an Aboriginal community every three months to investigate residents' complaints about administration, to inspect the records of the Aboriginal Court and to report on any matters requested by the Under Secretary.<sup>99</sup> No longer was the magistrate required to "inspect all premises in the reserve in which Aborigines are accommodated".<sup>100</sup> Whereas previously the departmental head could authorise an investigation of a community, it was now for the Governor-in-Council to authorise inquiries under the Commissions of Inquiry Act. Not that any inquiry has been held, nor that visiting justices have made reports to the Under Secretary; but these provisions are still extant.

The Under Secretary is still empowered to grant aid whether in money (appropriated by parliament), in kind or by way of services to any Aborigine who applies.<sup>101</sup> Most requests are now directed to the Commonwealth Department of Social Services. Some money is still paid out for emergencies including fares to assist those released from jail to return to their communities. Money may be paid out by way of secured loan, unsecured loan or grant. Under the old legislation, a district officer had power to manage the property of an Aborigine who applied. The Under Secretary is authorised to continue such arrangements which were in place in 1984.<sup>102</sup> But there is no provision for setting up new management arrangements. The Under Secretary may still provide banking facilities.<sup>103</sup> There are Commonwealth Savings Bank agencies on all communities.

The Under-Secretary retains an option to administer the estate of any Aborigine who has died without appointing an executor or whose executor is resident outside Queensland or who is unwilling or incapable of acting as executor. He may also administer the estate of an Aborigine who is missing. These provisions apply to Aboriginal estates whether or not the Aborigine lived on a DOGIT community.<sup>104</sup> They also apply to any person who resides on a DOGIT community whether or not they are Aboriginal.<sup>105</sup>

The Under-Secretary has the option of administering such estates or handing the matter to the Public Trustee.<sup>106</sup> Where an Aborigine dies without a will and it is "impracticable to ascertain the person or persons entitled in law to succeed to the estate", the Under-Secretary may make a final determination about entitlement and any remainder vests in the Under Secretary who shall apply the moneys for the benefit of Aborigines generally.<sup>107</sup>

This legislative scheme is contrary to the recommendation of the 1982 Aboriginal working party whose deliberations were recorded by DAIA as follows: "Under present legislation the director can administer the estate of a deceased Aborigines whether or not a will exists appoint another person. The working group consider that this arrangement should only continue if the department is appointed as executor in the will or in the event that no will is made, if so appointed by the next of kin of the deceased. In all other situations, the working group feel that deceased estates would be handled by the executor appointed in the will or by the Public Trustee."

The legislation does not contain a sunset clause but it has been amended often. Provision was made for the Governor-in-Council to receive a report on the Act's operation from the Aboriginal Co-ordinating Council which was due as soon as practicable after 31 May 1988.<sup>108</sup> The government granted the ACC two extensions of time. Their report was submitted at the end of 1989 and formed the basis for major changes to financial management and accountability provisions introduced in 1990 by the Goss government. Introducing the legislation in 1984, Mr Katter said it reflected "the government's desire to unfetter Aboriginal and Islander people in formulating decisions which affect the development of their communities and which shape their future position in Queensland society".<sup>109</sup> As will be shown, this desire was not fulfilled but there were definite improvements made.

### **(a) Local Government**

Mr Katter spoke of "the quintessence of this legislation: that local government decision making powers will, with this legislation, shift to the local democratically elected community council. The responsibilities which this government will divest from itself into local hands are not to be taken lightly".<sup>110</sup> Part III of the Act (especially ss. 14-35) deals with local government of DOGIT areas and communities. Under s.14, the Governor-

in-Council may approve the setting up of an Aboriginal council to govern any land granted in trust or reserved and set apart for the benefit of Aborigines.<sup>111</sup> The fifteen existing community reserve areas were deemed to be so approved.<sup>112</sup> The Governor-in-Council may set up a council for country reserves and other areas such as Old Mapoon. Aboriginal councils are incorporated.<sup>113</sup>

Councillors are elected and hold office for three years.<sup>114</sup> Elections are held on the same day as local government elections generally in Queensland. Elections are conducted by the rules in a schedule of the Local Government Act and according to the usual Local Government Election regulations. These provisions have been generally satisfactory except that some council clerks have been subjected to great pressure by community residents questioning their exclusion from the voters' roll because they are not on the state electoral roll.<sup>115</sup> In some instances it may be desirable that an outsider be returning officer or that an official from the Electoral Office be on hand to explain legal requirements. A voter education programme is also needed.

Under the Nationals, a council had five members who appointed their chairman and deputy chairman.<sup>116</sup> If no chairman or deputy were appointed within twenty-one days of the day appointed for the first council meeting after an election, the Minister for Community Services could make the necessary appointment from the elected councillors.<sup>117</sup> A council could replace its chairman at any time by resolution provided fourteen days notice was given of the intention to move such a resolution.<sup>118</sup> Under new regulations gazetted on 15 December 1990, an Aboriginal council may now pass a resolution or the electors may petition the minister to change the size of a council and to require that the chairman be elected directly by the electors.<sup>119</sup>

To qualify for election under the National Party's legislation, a person did not need to be of Aboriginal race but only part of the community having resided continuously in the area for not less than six months prior to nomination day. A non-Aboriginal spouse could be eligible for election. A person residing in a community by virtue of a public service appointment there would not have been eligible for election, not being part of the community.<sup>120</sup> The Goss government changed the requirement for election such that only persons of the Aboriginal or Torres Strait Islander races, who complied with the residence requirement, would be eligible for election. A

person who is bankrupt or undergoing a sentence of imprisonment is not eligible for election.<sup>121</sup> All persons on the state electoral roll at the preceding 31 December are entitled to vote in a council triennial election if their address on the electoral roll is inside the trust area. There continues to be some doubt about public servants whose residential address is a crown reserve excised from a trust area but surrounded by DOGIT land. Candidates can be nominated by any two electors.

As well as being trustee of community land, the community council is also the local government of the area. An Aboriginal council "has and may discharge the functions of local government for the area for which it is established". It is charged with "the good rule and government thereof in accordance with the customs and practices of the Aborigines concerned"<sup>122</sup>. The by-law making power is very broad. A council may make by-laws for promoting, maintaining, regulating and controlling:<sup>123</sup>

the peace, order, discipline, comfort, health, moral safety, convenience, food supply, housing and welfare of the area for which it is established;

the planning, development and embellishment of the area for which it is established;

the business and working of the local government of the area for which it is established.

A 1986 amendment ensured that an Aboriginal council has the power to do anything that an ordinary local authority is authorised to do under any Queensland Act.<sup>124</sup> A council may involve itself in any matter which, in its opinion, is "necessary or conducive to the good rule and government of the area or community" or to the well-being of its inhabitants.<sup>125</sup>

A by-law passed by a council has no force or effect until it has been advertised, objections have been considered, and it has been approved by the Governor-in-Council.<sup>126</sup> The procedure is similar to that under the Local Government Act.<sup>127</sup> By-laws can make provisions for licences, fees, rates, and rents and can impose monetary penalties.<sup>128</sup> They cannot provide for imprisonment as a penalty.

A council cannot exercise its local government functions over land which is crown reserve excised from a deed of grant in trust. It can continue to exercise its functions over land which reverts to crown land from a DOGIT for the purposes of a lease being issued to a resident under the Land Holding Act.<sup>129</sup> As is the case with any other local authority in Queensland,<sup>130</sup> an Aboriginal council may be dissolved by the Governor-in-

Council in his absolute discretion or upon petition of one-fifth of the electors.<sup>131</sup> An administrator may be appointed<sup>132</sup> and fresh elections are convened at the discretion of the Governor-in-Council.<sup>133</sup>

The 1984 legislation provided a three year handover period for transferring functions and resources from the Queensland government to local councils. The lynch-pin of this operation was the executive officer who retained some of the powers of the manager under the 1971 Aborigines Act. During the handover period, the executive officer retained final say over the use of departmental personnel and property and had to countersign cheques drawn on the State Government Financial Aid Fund. For this arrangement to persist beyond 31 May 1987, it had to be requested by the Aboriginal council.<sup>134</sup> The Goss government repealed the provisions for executive officers in 1990.

In the first three years, only five councils moved to responsibility for full government services. They were Cherbourg, Woorabinda, Palm Island, Yarrabah and Hopevale. The Queensland government had been pressuring other councils to take the step. The DCS Annual Report for the year ended 30 June 1988 stated: "It is expected that these councils will receive responsibility for full local government services within the next twelve months".<sup>135</sup> The report claimed that "With land tenure arrangements firmly established the Department has now accelerated the transfer of equipment, personnel and funds to the councils aiding them in obtaining an even greater degree of independence".<sup>136</sup> The training provided was too little, too late. However public servants were seconded to councils in an attempt to facilitate the handover of functions.

### **(b) Financial Accountability**

While setting up a basic local government structure for the administration of communities, the Nationals' legislation did not adopt the approach of the Local Government (Aboriginal Lands) Act 1978 which applied the provisions of the Local Government Act generally to the Aurukun and Mornington Island shires, subject to particular provisions of that Act.<sup>137</sup> The 1984 Act contained provisions which paralleled the Local Government Act but with significant deviations which highlighted the policy of the Act, especially with regard to financial accountability. A council was required to maintain four separate funds:



1. a State Government Financial Aid Fund into which are paid all moneys appropriated by the Queensland Parliament.<sup>138</sup>

2. a Trust Fund which consists of all Commonwealth moneys and other grants for specific purpose.<sup>139</sup>

3. an Enterprise Fund for canteen profits and receipts from any other council enterprises.<sup>140</sup>

4. a General Fund for receipt of fees, charges, rent, and court fines as well as a receipts not payable into any other fund.<sup>141</sup>

Council was required to draw up an annual budget for each fund. The minister could prescribe the form and manner for the framing of budgets. No budget had any force or effect until it was approved by the minister. When a budget was adopted by council, it was then submitted to the Under Secretary. The department vetted it and then forwarded it to the minister who had an unfettered discretion to approve or reject it.<sup>142</sup> This procedure had no equivalent in the Local Government Act. All non-Aboriginal councils, as well as the Aurukun and Mornington Island Councils, were spared such a requirement and were simply charged with the task of having a budget available for public inspection.<sup>143</sup>

Where council members made disbursements not provided for in a budget and there were no "emergent or extraordinary circumstances", the members who knowingly voted for the expenditure were jointly and severally liable to repay the money.<sup>144</sup> This provision was similar for other local authorities.<sup>145</sup> However in the case of an ordinary local authority, proceedings are instituted by electors or creditors of the council.<sup>146</sup> In the case of an Aboriginal council, the minister could institute proceedings "as agent of and in the name of the Aboriginal council".<sup>147</sup>

The minister had power to direct a council in its accounting methods. The Under Secretary could authorise a person to enter council premises and inspect the accounts. The accounts were audited by the Auditor-General "as if the council were a department of government of Queensland".<sup>148</sup> Ordinary councils have to keep such accounts as prescribed by the regulations.<sup>149</sup> Whereas the Under Secretary or any person authorised by him was empowered to enter premises to inspect records and to make copies, the only requirement for ordinary councils is to comply with any summons made by the auditor for the production of records.<sup>150</sup> There is no general power of entry given an auditor for an ordinary council even if it be the subject of a special audit ordered by the minister.<sup>151</sup> These onerous

provisions resulted in the ridiculous situation that the transactions of a community canteen were audited as if they were government activity demanding accountability to the minister. Each quarter, the council chairman had to submit a statement to the minister of receipts and disbursements with respect to each of the four council funds.<sup>152</sup> The chairman had also to provide the minister with an annual statement for each fund. Until May 1987, the requirements were even more onerous, the chairman having to provide monthly statements.

With an ordinary council (including Mornington Island and Aurukun), the clerk must present a monthly report to the local authority setting out accounts, receipts and disbursements. Aboriginal councils had no legislative guarantee of the receipt of such a report from their clerk. However the chairman was compelled to give a similar report, not to the council, but to the minister. A similar policy change was made requiring the chairman of the council to submit his annual financial statement to the minister, rather than the clerk submitting the statement to the local authority itself.<sup>153</sup> An Aboriginal council's borrowing powers and short term investment powers are similar to those of other local authorities.<sup>154</sup> Treasury approval is required before entering borrowing negotiations.<sup>155</sup> Treasury loans and sale of debentures are the usual avenues for local authorities.<sup>156</sup>

The accountability provisions of the 1984 Act were not the stuff of self management nor even of responsible local government. They affected such a substantial shift in financial responsibility from the elected council to the minister and the Under-Secretary as to render the grant of local government powers subject to the overriding discretion of the minister and the Under-Secretary. The minister was wrong when he claimed that these local government provisions were "bringing these communities into line with the rest of the state".<sup>157</sup> In many instances, it was "as if the council were a department of government of Queensland".<sup>158</sup>

When the Queensland legislation was passed, a strong case for more self-management and less stringent accountability could be made by comparing the Queensland provisions with those in New South Wales and in Commonwealth legislation. That case was somewhat weakened by later amendments both to the Land Rights Act in New South Wales and the Commonwealth's Aboriginal Development Commission Act. Just before it went out of existence in 1990, the ADC had to have its estimates approved by

the minister who had power to give ministerial finance directions. The minister could order audits of any companies that were subsidiaries of the commission. Audits were conducted by the Auditor-General who could order the production of such information as was considered necessary for the conduct of an audit. The minister appointed a general manager and all staff were employed under the Public Service Act. The commission was required to draw up a corporate plan in consultation with the minister. The plan was to be reviewed regularly in consultation with the minister.<sup>159</sup> Explaining the policy changes, the Prime Minister Mr Hawke described the "nub of the issue" as "finding the right balance between the principles of self-management and overall ministerial responsibility." He said his government, like that of Mr Fraser, had been prepared to accept "an element of risk" in allowing the ADC to operate "with a less than conventional level of ministerial oversight for a statutory authority."<sup>160</sup>

Even accepting that neither side of politics was any longer prepared to run the same risk in the name of self-management, a case could still be made for restricting the onerous Queensland provisions to the State Government Financial Aid Fund. More conventional supervision and auditing provisions could be applied to the other funds. The argument was to find favour with the new Goss government which passed wholesale amendments to the accountability provisions in 1990.

Under amendments which received assent on 18 December 1990, a council now has to prepare a separate budget for each fund which is to be adopted by the council and made open to inspection by persons resident in the trust area. The Auditor-General now has power to appoint independent qualified auditors for a council. After certification of financial statements by the Auditor-General, a council tables the statements and must make them available for inspection by residents. The council clerk must present the chairman with financial statements for each fund each month.<sup>161</sup> Community councils are now more like ordinary local authorities in their financial accountability. However the minister has now published a set of Aboriginal and Islander Accounting Standards. It is a legal requirement that each council now produce its own administration and financial procedures manual by 31 December 1992. The manual must be consistent with the minister's published standards.<sup>162</sup>

### **(c) Community Policing**

Queensland police have the same duties in Aboriginal communities as in other parts of Queensland.<sup>163</sup> They can give directions and exercise control over Aboriginal police.<sup>164</sup> They are required to assist with the removal of persons from Aboriginal communities when requested by an Aboriginal council or its agent.<sup>165</sup> Aboriginal councils, with the minister's approval, can appoint Aboriginal police who have the function of maintaining peace and good order.<sup>166</sup> Aboriginal councils can make by-laws for maintaining peace and order in their communities.<sup>167</sup> Aboriginal police have statutory authority to use reasonable force while maintaining peace and good order. No statute gives them powers of arrest greater than the power exercisable by other citizens. But further powers can be conferred upon them by by-laws.<sup>168</sup> The government has taken the view that the power of arrest may therefore be conferred by by-law even though there is no specific statutory head of power as there is in the Local Government Act that "a by-law may authorise (persons) to arrest or remove persons offending against this Act or any by-law made thereunder."<sup>169</sup>

As the Community Services Act specifies the power of police to assist in the summary removal of people from an area but is silent on powers of arrest, it is strongly arguable that the power of arrest cannot be conferred by by-law on Aboriginal police as an added function, duty or power. If not conferred by statute and if a statute provides no specific by-law making power with regard to arrest, there can be no power to arrest conferred or exercised other than that exercisable at common law. Breaches of by-laws were dealt with by Aboriginal courts in the case of community members and by magistrates courts in the case of visitors, public servants and their households.<sup>170</sup> Under the 1990 amendments, the jurisdiction of an Aboriginal court extends "to any persons, whether Aborigines or not, who are in or enter upon the area for which the court is constituted".<sup>171</sup> A Court may impose a fine but not imprisonment for a breach of by-laws.<sup>172</sup> A Court can make fine option orders providing for Community service.<sup>173</sup>

The Queensland Police Department has for some years been committed to a Queensland police presence on all Aboriginal communities. There are still no officers at Doomadgee, Hope Vale or Wujal Wujal. Officers were to be placed at Doomadgee as soon as the watch-house was upgraded. Officers will probably be placed at Ayton so as to service Wujal

Wujal. Hope Vale will continue to be serviced from Cooktown and Napranum from Weipa North. The Queensland Police Department will not train Aboriginal police at the Police Academy but it is committed to providing a two week training course for Aboriginal police. The government permits and encourages councils to pass by-laws relating to street offences especially common assaults, public drunkenness, disorderly behaviour, obscene language, destruction of property, and possession of dangerous articles. The government has given sympathetic consideration to proposed by-laws relating to assaults on Aboriginal police, resisting Aboriginal police in the course of their duties, and trespassing on Aboriginal land. The government has approved by-laws giving Aboriginal police the power of arrest in relation to these street offences.

The Children's Services Department is agreeable to having children (10-17 years) dealt with by formal caution for breach of by-laws. It will not agree to children being left in watch-houses unless they be separated from adult prisoners. The department is agreeable to Aboriginal courts being substituted for children's courts for breach of by-laws. To date, this has not occurred.

Community councils can pass by-laws relating to street offences and Aboriginal police powers. The government is prepared to draft model by-laws for street offences which would be assured more hasty approval by the Governor-in-Council, if enacted by an Aboriginal council. If a Community council chooses not to pass by-laws relating to street offences and Aboriginal police powers, it remains for Queensland police to implement the usual applicable Queensland law. Aboriginal police have no special powers of arrest or detention in these circumstances. If a council wished to pass by-laws relating to other more serious offences or expanding further the powers of Aboriginal police, it is unlikely that such by-laws would be approved.

Community councils can decide for themselves the number of Aboriginal police and other workers (e.g fire prevention officers, ambulance bearers, community development officers, by-law inspectors, rangers, and other authorised officers<sup>174</sup>) they will employ. It is only the Aboriginal police who are under the control and direction of resident Queensland police.<sup>175</sup> By-laws are needed to provide for legal ambulance services. As the employer of Aboriginal police, a council is legally responsible for the actions of Aboriginal police performed in the course of their duty. Governments have been unwilling to assume this responsibility or to

indemnify councils for this employer's liability. An employer is not liable for all actions of an employee but is responsible for actions carried out during the course of employment according to the terms of employment. Councillors have said they want indemnity from government for any liability they may incur as employer of Aboriginal police. They want indemnity for the liability which would be incurred by the Queensland Police Department and crown if the Aboriginal police were employees of the police department.

The Queensland police claim not to have the resources to extend standard policing to Aboriginal communities. They see a need for a substantial number of Aboriginal police empowered to deal with standard street offences. If an Aboriginal council decides not to pass by-laws relating to these matters and does not appoint Aboriginal police, there is a vacuum in the policing of the community. A council desiring more self-management and self-determination can assume more responsibility for policing street offences. A council wishing to confine itself more to standard local government functions needs to discuss law and order with Queensland police and to seek a change in government policy.

Community policing has been one of the major problem areas under the Community Services Act. The Queensland police have pleaded budgetary constraints in avoiding the primary responsibility for policing these communities. Rather than training and using local Aborigines as assistants, they have often abandoned adequate law enforcement and justified the failure to deliver the service as self-management. The ACC has taken a strong stand on this issue but to no avail. In December 1986, the ACC resolved "that the Aboriginal police no longer come under the control of the community council, but that the state police assume this responsibility, under the condition they provide acceptable training and career structures and that the Police Act and other Acts are amended to provide the necessary power for them to perform their duties".<sup>176</sup>

The matter was to be resolved by cabinet by March 1987. Queensland police won the day and cabinet thought the matter would be resolved by allowing Aboriginal police the power to arrest people for street offences. A meeting of all relevant government departments was convened with an ACC representative. The ACC did not want to be forced into having their councils accept responsibility for law enforcement or the communities. So in July 1987 at their next meeting members resolved:

1. The ACC requests the Governor-in-Council to approve Aboriginal council by-laws for local government immediately, without insisting on by-laws for street offences.
2. The ACC confirms the right of councils to make or not to make special by-laws covering street offences.
3. The ACC confirms the right of councils to set up or not to set up their own system of Aboriginal police
4. The ACC asks that the government indemnify any council which employs Aboriginal police for any employer liability regarding the actions of Aboriginal police performed in the course of their duty.<sup>177</sup>

And again in September 1987, the ACC considered the Queensland government's intransigence and unwillingness to extend normal policing to Aboriginal communities. In exasperation, members resolved:

The Aboriginal Co-ordinating Council is disturbed that the Queensland Police Department has not accepted full responsibility for law and order on Aboriginal Communities. The Aboriginal Co-ordinating Council demands that Queensland police be placed on or close to all Aboriginal communities immediately and that the Queensland Police Department train, employ and supervise Aboriginal police. The Aboriginal Co-ordinating Council supports any Aboriginal councils which do not want to bear the responsibility of employing untrained Aboriginal police who are not equipped to maintain law and order. The Aboriginal Co-ordinating Council requests amendments to the Police Act and Community Services Aborigines Act making Queensland police responsible for Aboriginal police and their training.<sup>178</sup>

Community policing remained an unresolved problem throughout the term of Mr Katter's ministry. The Goss government has not made any changes to policy on the matter.

#### **(d) Aboriginal Courts**

An Aboriginal court can be constituted in a DOGIT area by two Aboriginal residents who are justices of the peace and who are not parties to the proceedings. Where two such persons cannot be readily obtained, a court may be constituted by a majority of council members none of whom is party

to the proceedings.<sup>179</sup> This permitted breach of the separation of powers doctrine in the legislation was contrary to the wishes of the Aboriginal Advisory Council. In its own report on "Work in Progress", the DAIA recorded that the Aboriginal working party felt "that members of the council should be divorced from court work and that instead each place should have sufficient justices of the peace to operate on rotation.<sup>180</sup> Since 1984, ordinary residents on these communities have been subject to the jurisdiction of these courts while departmental staff officers (e.g police, school teachers, nurses etc) and their families used to be dealt with by a magistrates court.<sup>181</sup> This discrimination occurred despite "an important suggestion" recorded by the DAIA from the Aboriginal working party "that the new legislation should provide for a person brought before the Aboriginal court to elect that the charges be heard by the magistrates court".<sup>182</sup> Since December 1990, the Aboriginal courts have had power to deal with all persons on a trust area, whatever their race or residence status.

An Aboriginal court can deal with by-law breaches. An appeal on conviction or sentence can be made through the Queensland court system as if the Aboriginal court were a magistrates court.<sup>183</sup> So the only avenues of appeal are the order to review by the Supreme Court and a rehearing de novo in the District Court. A breach of by-laws is not punishable by imprisonment but an Aboriginal court can order community service by way of a fine option order.<sup>184</sup> When a defendant defaults on payment of a fine, imprisonment can result. Enforcement of an Aboriginal court's decision is pursuant to the usual provisions of the Justices Act.<sup>185</sup>

As some recognition of the operation of customary law, the Queensland parliament has provided that this jurisdiction at first instance and presumably on appeal is to be exercised "in accordance with the appropriate by-law having regard to the usages and customs of the community" in the area.<sup>186</sup> An Aboriginal court may also hear and determine a dispute which does not entail a breach of commonwealth, state or council law if the dispute concerns "a matter accepted by the community resident in the area as a matter rightly governed by the usages and customs of that community."<sup>187</sup> So there is scope for an Aboriginal court to arbitrate community disputes. An Aboriginal resident can be appointed as clerk of court performing the same functions as a clerk in a magistrates court.<sup>188</sup> The clerk has custody of all court records and proceedings.<sup>189</sup>



### **(e) Industry and Business**

In most communities, the only profitable enterprise at the time of handover was the beer canteen. In every case, it was transferred to the council under DOGIT. Other enterprises conducted by DCS were usually excluded from the deed. Expressions of interest were invited from residents. Where DCS was satisfied about the viability of a handover, leases of enterprises were negotiated directly between DCS and the resident or resident group. The rationale of this approach was said to be a commitment to self-management but with a desire to avoid placing all power and responsibility in the hands of the council.

Some small enterprises such as take away shops and garages were already being conducted by residents. Their situation was unaffected except that their leases are now held from the council rather than the crown.<sup>190</sup> Community cattle enterprises were variously treated depending on local demands and wishes. At Edward River, Mr Katter took the unusual step of excising 110,000 hectares from the community's proposed land grant and granted a thirty year crown lease to one resident. DCS then negotiated for the transfer to him on commercial terms of all livestock grazing within the leasehold.<sup>191</sup> The Woorabinda Council took over the cattle operations at Foleyvale, Zamia Creek, Duinga and Sorrell Hills. With ADC assistance, the council was able to purchase the stock "at a concessional rate."<sup>192</sup> The Cherbourg Dairy Farm was transferred to the council, the herd being purchased "at a concessional fee" and departmental staff were seconded to the council.<sup>193</sup> At Lockhart River, the government omitted a 4,470 hectares area from the DOGIT and granted a special lease for thirty years to the council and corporation of the Under Secretary for Community Services "as tenants in common in the interests of 3/5ths and 2/5ths respectively" for grazing and agricultural purposes. The retail stores at Yarrabah and Cherbourg have been leased to local residents. Two local co-operatives have made bids for the Palm Island store. The department had hoped to transfer all retail stores to private ownership by 30 June 1990. This still has not happened.

Most enterprises used be funded from the Aborigines Welfare Fund which was divested from the Under-Secretary in 1986 and vested in the Corporation of the Under Secretary for Community Services. The fund, previously under the Aborigines Regulations of 1972, was "maintained for the general benefit of Aborigines".<sup>194</sup> Assets purchased from the fund were

not available for transfer to councils or community members without payment to the fund. The fund still exists though its mode of administration is unclear.

Answering a question on notice in parliament: "What is the government's approach to expenditure of Aborigines Welfare Fund monies for development on Aboriginal trust area communities?", Mr Katter replied, "Some of those funds that might be available within the Aborigines Welfare Fund for Development use on trust areas are applied from time to time for purposes as identified in consultation with the Aboriginal Co-ordinating Council. The matter of the use of those funds for the creation of a small loan fund is before the Aboriginal Co-ordinating Council and the Attorney-General. Under my instructions, a full program for the expenditure of those funds has been prepared as a discussion paper for the next meeting of the Aboriginal Co-ordinating Council."<sup>195</sup> The ACC met four months later but no discussion paper was brought to their attention. On 4 August 1987, the ACC executive met and directed their chairman to discuss the welfare fund with Mr Katter on 11 August 1987. They requested "the Minister Mr Katter clarify his response in question time in parliament on 17 March, 1987, when he said a discussion paper was before the Aboriginal Co-ordinating Council and the Attorney-General, for the establishment of a small loan fund from the Welfare Fund. We have not seen nor heard of this paper at any time and would like further information and consultation."<sup>196</sup>

The operation of the Welfare Fund remains a departmental concern, clouded in mystery. The ACC has asked for any necessary legislative amendment to permit transfer of assets to local communities without payment of adequate consideration. No amendment has been made. Residents must satisfy the department if they are to take over local enterprises. Admittedly, government policy has been to transfer enterprises quickly and cheaply but only to those who satisfy departmental officials.

Part V of the Community Services (Aborigines) Act 1984 provides for an Aboriginal Industries Board which "shall be established" and be a body corporate having power to conduct all sorts of business from common carrier to tinsmith. The board was to consist of the Under-Secretary, three government nominees and five members of the Aboriginal Co-ordinating Council. Easily labelled as socialist and centralist and never being requested by any local community, it has never come to be. It was to be modelled on

the Island Industries Board in the Torres Strait. The path of local control, decision-making, and ownership has been preferred for good reason.

**(f) The Aboriginal Co-ordinating Council**

Each council of the fourteen Aboriginal communities has two representatives on the Aboriginal Co-ordinating Council (ACC). They are the chairman and one other councillor selected by the relevant community council. Other members of an Aboriginal council may act as delegates in the absence of their chairman or selected representative at the ACC.<sup>197</sup> The ACC is a body corporate. It usually meets four times a year. It must meet at such times and places as are approved by the minister and may meet at such other times and places as they determine.<sup>198</sup> It has an executive committee of four members (one from each division of the state) which meets regularly.<sup>199</sup> Being empowered to employ agents and servants, it has a secretariat in Cairns with a director, secretary, researcher and office staff. Its functions include providing advice to all levels of government on matters affecting the progress, development and well-being of Aborigines. It makes recommendations to the minister and the Under-Secretary concerning matters affecting the progress, development and well-being of Aborigines and the administration of the Community Services Act.<sup>200</sup>

The ACC had the statutory function of reporting to the minister as soon as is practicable after 31 May 1988 on the operation of the Queensland legislation. Their 1989 report which recommended changes in law and administration was not acted until the Goss government came to power.

The ACC is subject to the same budgetary restrictions and supervision as are the Aboriginal councils.<sup>201</sup> Borrowings must be approved by the minister.<sup>202</sup> The ACC elects its own chairman and deputy chairman who may be replaced by resolution provided all members have been given fourteen days of intention to move such a resolution.<sup>203</sup> The ACC chairman provides an annual report to the minister.

Communities other than DOGIT ones are not represented on the ACC. However representatives from Aurukun and Mornington Island are often invited. So too are members of small Aboriginal communities (such as Coen, Cooktown, Mt Isa) when their concerns have been addressed to the ACC for assistance.

In 1986, the ACC was given power "to establish and operate such lawful businesses as the council thinks fit, for the promotion, progress,

development and well-being of Aborigines."<sup>204</sup> However, the ACC cannot expend money in an area unless it has the approval of the local Aboriginal community council.<sup>205</sup> Despite the ACC's business powers, it is still Queensland Aboriginal Creations, described as "the wholesale and retail section" of DCS, which markets and sells artefacts.

### **(g) Alcohol**

There is no longer a discriminatory ban on the consumption of alcohol by residents of what were Aboriginal reserves. Most community councils conduct a beer canteen. It is now necessary to hold a canteen licence. Other types of licence are available but to date none has been applied for or granted. When the Community Services Act was passed in 1984, the Under-Secretary maintained power and discretion on alcohol availability. A council required his consent to run a beer canteen. No other sort of alcohol could be sold. He had the power to close down a canteen.<sup>206</sup> Now the matter is governed by provisions of the Liquor Act. An Aboriginal council may apply for a licence or permit under the Liquor Act. So too may any other person but their application must be referred by the Liquor Commission to the local Aboriginal council for its consideration.<sup>207</sup>

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- 1 s. 334 (1), Land Act.
  - 2 s. 5, Land Act.
  - 3 s. 5, Land Act.
  - 4 s. 335, Land Act.
  - 5 s. 334B(4), Land Act.
  - 6 s. 203(b), Land Act.
  - 7 s. 343(4), Land Act.
  - 8 s. 353A(1), Land Act.
  - 9 The term "community town area" is not defined by statute.
  - 10 s. 334D, Land Act.
  - 11 s. 352A(1), Land Act.
  - 12 s. 352A(4), Land Act.
  - 13 s. 334C, Land Act.
  - 14 s. 203(a), Land Act.
  - 15 s. 203(b), Land Act.
  - 16 s. 19, Land Act (Aboriginal & Islander Land Grants) Amendment Act 1982.
  - 17 s. 334 C, Land Act.
  - 18 s. 334C (a) (ii) & (iii), Land Act.
  - 19 s. 334F, Land Act.
  - 20 Land Act Amendment Act 1986 (No. 2).
  - 21 s. 334 C(b), Land Act.
  - 22 Department of Community Services, Annual Report 1987, Government Printer, Brisbane.
  - 23 Department of Aboriginal and Islanders Advancement, Annual Report, 1982, Government Printer, Brisbane (with metric conversion).
  - 24 (1982) 289 QPD 2534.
  - 25 Department of Community Services, Annual Report 1987, Government Printer, Brisbane. Some figures have been taken from individual deeds of grant in trust.
  - 26 K. B. Tomkins, Ministerial Statement, (1982) 289 QPD 2536.

- 27 Department of Aboriginal and Islanders Advancement, Annual Report, 1982, Government  
Printer, Brisbane (with metric conversion).
- 28 (1957) 219 QPD 1431.
- 29 s. 22(a), Land Act (Aboriginal and Islander Land Grants) Amendment Act 1982.
- 30 (1988) QPD 3197; 24 November 1988.
- 31 s. 45(ii) Forestry Act, as amended by s.17, Land Act (Aboriginal and Islander Land Grants)  
Amendment Act 1982.
- 32 s. 77(3), Community Services (Aborigines) Act 1984-1986.
- 33 s.77(2), Community Services (Aborigines) Act 1984-1986.
- 34 (1988) QPD 3197; 24 November 1988.
- 35 s. 77(1), Community Services (Aborigines) Act 1984-1986.
- 36 s. 77(2), Community Services (Aborigines) Act 1984-1986.
- 37 s. 65(1), Community Services (Aborigines) Act 1984-1986.
- 38 s. 65(2), Community Services (Aborigines) Act 1984-1986.
- 39 s. 66(1)(a), Community Services (Aborigines) Act 1984-1986.
- 40 s. 66(1)(b), Community Services (Aborigines) Act 1984-1986.
- 41 s. 69, Community Services (Aborigines) Act 1984-1986.
- 42 s. 68, Community Services (Aborigines) Act 1984-1986.
- 43 s. 69, Community Services (Aborigines) Act 1984-1986.
- 44 s. 70, Community Services (Aborigines) Act 1984-1986.
- 45 s. 350(1)(a), Land Act.
- 46 ss. 350(1)(b) and (2), Land Act.
- 47 s. 4., Aborigines & Torres Strait Islanders (Land Holding) Act 1985, definition of "qualified  
person".
- 48 Schedule of Trusts, Deed of Grant in Trust.
- 49 s. 343(A)(1), Land Act, inserted by Land Act and Another Act Amendment Act 1988, No 12.
- 50 s. 343(A)(2), Land Act.
- 51 Form 1, Schedule, Aborigines & Torres Strait Islanders (Land Holding) Regulations.
- 52 s. 6(1)(a), Aborigines & Torres Strait Islanders (Land Holding) Act 1985.
- 53 s. 6(1)(b), Aborigines & Torres Strait Islanders (Land Holding) Act 1985.
- 54 s. 7, Aborigines & Torres Strait Islanders (Land Holding) Act 1985.
- 55 s. 30, Aborigines & Torres Strait Islanders (Land Holding) Act 1985.
- 56 s. 7(2), Aborigines & Torres Strait Islanders (Land Holding) Act 1985.
- 57 s. 6(3), Aborigines & Torres Strait Islanders (Land Holding) Act 1985.
- 58 s. 11(1), Aborigines & Torres Strait Islanders (Land Holding) Act 1985.
- 59 s. 18(4), Aborigines & Torres Strait Islanders (Land Holding) Act 1985.
- 60 s. 343 Land Act.
- 61 s. 16, Aborigines & Torres Strait Islanders (Land Holding) Act 1985.
- 62 s. 15, Aborigines & Torres Strait Islanders (Land Holding) Act 1985.
- 63 s. 15(2), Aborigines & Torres Strait Islanders (Land Holding) Act 1985.
- 64 (1985) 298 QPD 4895.
- 65 s. 15(2)(c), Aborigines & Torres Strait Islanders (Land Holding) Act 1985.
- 66 s. 10, Aborigines & Torres Strait Islanders (Land Holding) Act 1985.
- 67 Justice Toohey, Seven Years on, A.G.P.S., 1984, p. 130.
- 68 (1985) 298 QPD 4896.
- 69 s. 21(4), Aborigines & Torres Strait Islanders (Land Holding) Act 1985.
- 70 s. 22, Aborigines & Torres Strait Islanders (Land Holding) Act 1985.
- 71 s. 22, Aborigines & Torres Strait Islanders (Land Holding) Act 1985.
- 72 s. 23, Aborigines & Torres Strait Islanders (Land Holding) Act 1985.
- 73 s. 25(3), Aborigines & Torres Strait Islanders (Land Holding) Act 1985.
- 74 s. 351, Land Act.
- 75 s. 351(3), Land Act.
- 76 s. 342, Land Act.
- 77 s. 352A, Land Act.
- 78 s. 342A, Land Act.
- 79 s. 339, Land Act.
- 80 s. 25, Community Services (Aborigines) Act 1984-1986.
- 81 These leases under s. 203(a), Land Act require payment of rent to the Crown and not to the  
Council.

- 82 ss. 274(e) & (6), Land Act, and s. 18, Aborigines & Torres Strait Islanders (Land Holding) Act 1985.
- 83 cf s. 13, Aborigines & Torres Strait Islanders (Land Holding) Act 1985.
- 84 ss. 286, 288, Land Act.
- 85 s. 275, Land Act.
- 86 s. 279(1), Land Act.
- 87 s. 19, Aborigines & Torres Strait Islanders (Land Holding) Act 1985.
- 88 ss. 17, 19, Aboriginal and Torres Strait Islander Commission Act 1989.
- 89 s. 282, Land Act.
- 90 s. 15(1), Aborigines & Torres Strait Islanders (Land Holding) Act 1985.
- 91 s. 340(3), Land Act.
- 92 Mason J (with whom Gibbs C.J., Murphy, Aickin, Brennan JJ agreed), *American Dairy Queen (Qld) Pty Ltd v Blue Rio Pty Ltd* (1981) 37 ALR 613 at 615.
- 93 No. 51 of 1984; assented to 15 May 1984.
- 94 No. 81 of 1985; assented to 20 November 1985.
- 95 No. 43 of 1986; assented to 25 September 1986.
- 96 Gazette, 9 February 1985, Vol CCLXXVIII, No. 28, pp. 521-9.
- 97 Gazette, 6 June 1987, p. 1000.
- 98 Preamble, Aborigines Act 1971.
- 99 s. 11, Community Services (Aborigines) Act 1984-1986.
- 100 s. 11(2)(a) Aborigines Act 1971
- 101 s. 71, Community Services (Aborigines) Act 1984-1986.
- 102 s. 73, Community Services (Aborigines) Act 1984-1986.
- 103 s. 72, Community Services (Aborigines) Act 1984-1986.
- 104 s. 75, Community Services (Aborigines) Act 1984-1986.
- 105 s. 6, definition of "Aborigine" and s. 75, Community Services (Aborigines) Act 1984-1986.
- 106 s. 75(2), Community Services (Aborigines) Act 1984-1986.
- 107 s. 75(5), Community Services (Aborigines) Act 1984-1986.
- 108 s. 53(2), Community Services (Aborigines) Act 1984-1986.
- 109 (1984) 294 QPD 2891.
- 110 *Ibid.*
- 111 ss. 14(1) and s. 5 (definition of "trust area"), Community Services (Aborigines) Act 1984-1986.
- 112 s. 14(1) as amended by s. 4 of Community Services (Aborigines) Amendment Act 1986.
- 113 s. 15, Community Services (Aborigines) Act 1984-1986.
- 114 s. 16, Community Services (Aborigines) Act 1984-1986.
- 115 s. 7(7)(i), Local Government Act 1936-1985, made applicable by reg 6(1)(a), Community Services (Aborigines) Regulations 1985.
- 116 reg. 7(1) & (2), Community Services (Aborigines) Regulations 1985.
- 117 reg. 7(3), Community Services (Aborigines) Regulations 1985.
- 118 reg. 7(7) & (8), Community Services (Aborigines) Regulations 1985.
- 119 reg. 7(1A), Community Services (Aborigines) Regulations 1985.
- 120 s. 6(1) definition of "Aborigine", Community Services (Aborigines) Act 1984-1986.
- 121 reg. 8(1), Community Services (Aborigines) Regulations 1985.
- 122 s. 25(1), Community Services (Aborigines) Act 1984-1986.
- 123 s. 25(2), Community Services (Aborigines) Act 1984-1986.
- 124 s. 25(3)(d), Community Services (Aborigines) Act 1984-1986.
- 125 s. 25(3)(c), Community Services (Aborigines) Act 1984-1986.
- 126 s.26, Community Services (Aborigines) Act 1984-1986.
- 127 s. 31, Local Government Act 1936-1985.
- 128 ss 25(4)-(6),28, Community Services (Aborigines) Act 1984-1986.
- 129 s. 10(4), Aborigines & Torres Strait Islanders (Land Holding) Act 1985.
- 130 s. 4(9), Local Government Act 1936-1985.
- 131 s. 20, Community Services (Aborigines) Act 1984-1986.
- 132 s. 21, Community Services (Aborigines) Act 1984-1986.
- 133 s.22, Community Services (Aborigines) Act 1984-1986.
- 134 s. 23, Community Services (Aborigines) Act 1984-1986.
- 135 Department of Community Services, Annual Report 1987-88, p. 12.
- 136 *Ibid.*, p. 6.
- 137 s. 14, Local Government (Aboriginal Lands) Act 1978.

- 138 reg. 19, Community Services (Aborigines) Regulations 1985.  
139 reg. 21, Community Services (Aborigines) Regulations 1985.  
140 reg. 22, Community Services (Aborigines) Regulations 1985.  
141 reg. 20, Community Services (Aborigines) Regulations 1985.  
142 s. 29, Community Services (Aborigines) Act 1984-1986.  
143 s. 25, Local Government Act 1936-1985.  
144 s.30(1), Community Services (Aborigines) Act 1984-1986.  
145 s. 25(4)(ix) and (5), Local Government Act 1936-1985.  
146 s. 28(14)(ii), Local Government Act 1936-1985.  
147 s. 30(2), Community Services (Aborigines) Act 1984-1986.  
148 s. 32(1) & (2), Community Services (Aborigines) Act 1984-1986.  
149 s. 29(1), Local Government Act 1936-1985.  
150 s. 29(5)(v), Local Government Act 1936-1985.  
151 s. 29(10), Local Government Act 1936-1985.  
152 s. 33, Community Services (Aborigines) Act 1984-1986.  
153 cf s. 33(1), Community Services (Aborigines) Act 1984-1986 and s. 29(3), Local Government Act 1936-1985.  
154 cf ss. 34, 35, Community Services (Aborigines) Act 1984-1986, and ss. 22, 23B, Local Government Act 1936-1985.  
155 s. 28(2), Local Government Act 1936-1985.  
156 s. 28(1), (10), (11), Local Government Act 1936-1985.  
157 (1984) 294 QPD 2755.  
158 s. 32(2), Community Services (Aborigines) Act 1984-1986.  
159 ss. 10A, 32A, 33(1), 36(2), 39A, 40A, 40B(7), Aboriginal Development Commission Act 1980 as amended by Aboriginal Development Commission Amendment Act 1989.  
160 (1989) 166 CPD 1325-6 (HofR).  
161 ss. 29, 29A-G, 32A-H, Community Services (Aborigines) Act 1984-1990.  
162 eg. 18A, Community Services (Aborigines) Regulations 1985.  
163 s 36(1), Community Services (Aborigines) Act 1984-1986.  
164 s. 40(2), Community Services (Aborigines) Act 1984-1986.  
165 s 70(2), Community Services (Aborigines) Act 1984-1986.  
166 s. 39(2), Community Services (Aborigines) Act 1984-1986.  
167 s. 25(2), Community Services (Aborigines) Act 1984-1986.  
168 s. 40(1), Community Services (Aborigines) Act 1984-1986.  
169 s. 31(10), Local Government Act 1936-1985.  
170 s. 44, Community Services (Aborigines) Act 1984-1986.  
171 s. 44, Community Services (Aborigines) Act 1984-1990.  
172 s. 25(6), Community Services (Aborigines) Act 1984-1986.  
173 reg. 24, Community Services (Aborigines) Regulations 1985.  
174 s.45B, Community Services (Aborigines) Act 1984-1990.  
175 s. 40(2), Community Services (Aborigines) Act 1984-1986.  
176 Aboriginal Co-ordinating Council, Resolution 13, 2 December 1986.  
177 Aboriginal Co-ordinating Council, Resolutions 11-14, 14 July 1987.  
178 Aboriginal Co-ordinating Council, Resolution 4, 15 September 1987.  
179 s. 42, Community Services (Aborigines) Act 1984-1986.  
180 DAIA , "Work in Progress", 1982, p. 2.  
181 s.44, Community Services (Aborigines) Act 1984-1986.  
182 "Work in Progress" p. 2.  
183 s. 45, Community Services (Aborigines) Act 1984-1986.  
184 reg. 24, Community Services (Aborigines) Regulations 1985.  
185 reg. 23(1), Community Services (Aborigines) Regulations 1985.  
186 s. 43(2), Community Services (Aborigines) Act 1984-1986.  
187 s. 43(2)(b), Community Services (Aborigines) Act 1984-1986.  
188 reg. 23(2), Community Services (Aborigines) Regulations 1985.  
189 reg. 25, Community Services (Aborigines) Regulations 1985.  
190 s. 203(b) Land Act, rather than s. 203(a).  
191 Department of Community Services, Annual Report 1985-86, p. 28.  
192 Department of Community Services, Annual Report 1987-88, p. 10.  
193 Ibid.

- 194 reg. 4(1), *Aborigines Regulations* 1972.  
195 (1987) QPD 683; 17 March 1987.  
196 Aboriginal Co-ordinating Council, *Executive Meeting, Minutes*, 4 August 1987, p. 2.  
197 s. 47, *Community Services (Aborigines) Act* 1984-1986.  
198 s. 49, *Community Services (Aborigines) Act* 1984-1986.  
199 ss. 48(1)(c), 50, *Community Services (Aborigines) Act* 1984-1986.  
200 s. 48(1)(a) & (b), *Community Services (Aborigines) Act* 1984-1986.  
201 s. 53A, *Community Services (Aborigines) Act* 1984-1986.  
202 s. 53B, *Community Services (Aborigines) Act* 1984-1986.  
203 reg. 26, *Community Services (Aborigines) Regulations* 1985.  
204 s. 48(1)(f), *Community Services (Aborigines) Act* 1984-1986.  
205 s. 48(2), *Community Services (Aborigines) Act* 1984-1986.  
206 s. 76, *Community Services (Aborigines) Act* 1984-1986, now repealed by s. 39(1) *Liquor Act* and  
other Acts Amendment Act 1985.  
207 s. 164L(3), *Liquor Act* 1912-1985.



# LABOR SETS THE LIMITS, 1990-1991

## 1. Reviewing the Services Legislation

When elected in December 1989, the Goss Government came to power with a commitment to large scale legislative reform for Queensland Aborigines and Torres Strait Islanders. At the last state conference of the Australian Labor Party prior to the election, an Aboriginal and Islander Affairs policy was finalised. Under that policy Labor was committed to repealing the Community Services legislation and the Cultural Record Act. These National Party initiatives were labelled as discriminatory. In opposition, the ALP had long been critical of the National Party's consultation processes. Thus there was a commitment to enact new legislation which would respond to decisions made during consultation with Aboriginal and Torres Strait communities. Labor was committed to establishing councils and structures necessary to identify traditional areas of land and to support the maintenance of Aboriginal tradition, culture, economic development and growth. The new Labor government was committed to legislating for the implementation of land rights with inalienable freehold title. In particular the party policy acknowledged the right of Aboriginal communities to refuse permission or to establish conditions for mining on their land and for the exploitation of forestry and fishing on their land. Echoing the New South Wales precedent, Labor pledged to establish "a community development and heritage fund" funded by an annual percentage allocation of land tax

revenues for the purchase of land and the provision of loans for commercial undertakings by Aboriginal groups.<sup>1</sup> Being helped to office by the royal commission report of Mr Tony Fitzgerald QC, Premier Wayne Goss pledged his commitment to open consultation and full accountability in determining and legislating new policies.

On 31 May 1990, the Parliamentary Committee of Public Accounts received and reviewed a report by the Queensland Auditor-General's office on the financial administration of Aboriginal and Island councils. The committee chaired by ALP member Mr Ken Hayward called for submissions on the administration and financial management of these councils. The seven member all-party committee found there were major problems with the administration of all community councils. The committee visited many Aboriginal communities and found that Aboriginal councils and individual councillors were often very demoralised and under such pressure that they were unable to discharge their responsibilities. The lack of financial accountability was seen to be a manifestation of far deeper problems in these communities. While appreciating the need for better training of councillors and council clerks, the committee decided that there were more fundamental issues involved. The minister, Anne Warner, had written to the Auditor-General saying, "Collaboration with Aboriginal and Islander communities is necessary to ensure that their aspiration of self-determination can be achieved whilst fulfilling the government's expectation for accountability of public expenditure."<sup>2</sup> Finally the committee recommended that the government enter into negotiations with each Aboriginal and Islander DOGIT Community so as to determine the appropriate structure and constitution for a local authority which could be a truly representative council in each community. The committee also recommended that the remaining defects in the DOGIT land title be rectified promptly and that there be further consideration as to who the appropriate trustees would be. The committee was strongly of the view that many communities and their councils were encountering difficulties because the elected council was not the appropriate land-holding body, especially when there were identifiable traditional owners who had interests in particular areas of land included in the one DOGIT.<sup>3</sup>

No sooner had the parliamentarians commenced their review of their administration of the Aboriginal communities and their councils, the minister Anne Warner established an Aboriginal and Islander Legislation

Review Committee which was asked to enquire into all legislation relating to the management of Aboriginal and Torres Strait Islander Communities in Queensland. Cabinet approved the setting up of this committee in August 1990. Chaired by Mr Eric Deeral from Hopevale, the committee consisted of five Aborigines and Torres Strait Islanders and was assisted by a secretariat headed by a senior Aboriginal public servant, Mr Shane Hoffman. Once both committees had put in their initial reports, the Goss government acted quickly to amend the Community Services legislation so as to withdraw the paternalistic accounting and auditing procedures. The broad investigative power of visiting justices was repealed. In its place, provision was made for a magistrate to review the records of an Aboriginal court and to offer advice to the members of an Aboriginal court about the harshness or leniency of sentencing.<sup>4</sup> The provisions relating to executive officers and their powers were repealed. Executive officers were withdrawn from Aboriginal communities by October 1990. The only exception was the Northern Peninsula Area where an executive officer was left resident at Bamaga so as to effect the handover and distribution of functions between the various Aboriginal and Torres Strait Islander councils in that area.

Under amendments to the budget provisions, it is no longer necessary for a budget to be framed in a form acceptable to the minister. No longer does the minister have the power to approve or reject a budget. As with mainstream local authorities, an Aboriginal council is now empowered to frame its own budget and is required to have it open for inspection by local residents. No longer are the accounts of an Aboriginal council to be audited by the Auditor-General "as if the council were a department of government of Queensland". Though the accounts are still audited by the Auditor-General, he may now appoint another person to perform the audit. Most councils now retain a private firm approved by the Auditor-General. Whereas financial returns and statements had to be submitted by an Aboriginal council to the minister, now those statements are tabled at an Aboriginal council meeting and made available for inspection by local residents. Rather than financial statements being prepared by an Aboriginal council and forwarded to the minister each month or each quarter, such statements are now prepared by the council clerk and forwarded to the Aboriginal council.

Whereas previously Aboriginal courts had jurisdiction only over persons who were Aboriginal, these courts now have jurisdiction over any

person who is in or enters upon a trust area. Aboriginal councils now have statutory power to appoint rangers and other authorised officers who can assist with the implementation of by-laws. Having made these interim amendments to the Community Services legislation so as to alleviate the more paternalistic provisions in the old legislation, the government turned its attention to more substantive law reform regarding land rights and self-management.

## **2. Preparing for Land Rights**

Aborigines in Cape York started to organise, holding the first meeting of the Cape York Land Council at Lockhart River in September 1990. Mr Robert Holroyd was chosen as chairman, with Francis Deemal as coordinator, and Noel Pearson as spokesman and campaign organiser. At its second meeting in October 1990, the land council called upon the Queensland government to cooperate with the federal government in funding traditional land purchases by traditional owners in Cape York. It also asked the state government to freeze any dealings with lands presently and previously set aside as Aboriginal reserve land. In view of the proposed development of a Cape York space base and other tourist developments which were being discussed in the media, the land council also called upon the state government to freeze any dealings with vacant crown lands and other lands subject to occupational licences in Cape York Peninsula until all traditional land claims had been settled with respect to those lands.

One of the Goss government's clear election pledges was to increase the national park estate of Queensland by one hundred per cent from 3.6 million hectares to over seven million hectares during its first term in government. Some of the increased national park holdings would have to be located in Cape York. In June 1990, the Aboriginal and Torres Strait Islander Commission had provided the funds for the purchase of Merapah Station which was then handed back to the Mungkanah people. This transfer of 116,500 square kilometres marked the first round in the race for land to be allocated to Aboriginal or environmental interests. Mr Pat Comben, the Minister for the Environment, was keen to increase the size of the Jardine National Park and to declare the McIlwraith Range area as a new National Park. Meanwhile Aborigines were agitating that the Archer River Bend National Park be transferred back to the Winychanam people

given that the traditional country had been gazetted as national park after Mr John Koowarta had commenced his historic litigation in the High Court of Australia. His case resulted in the striking down of the National Party policy prohibiting the transfer of pastoral leases to Aborigines when those leases had been purchased with commonwealth funds. Though Mr Koowarta had won his case, he never gained title to his land. Mr Comben was known to have concerns that handing back the land to Mr Koowarta would set a precedent for other land claims on national parks. Under pressure from the Cape York Land Council, Comben had told their spokesman Noel Pearson that people would have to wait until the government introduced land rights legislation before a decision could be made. Mr Koowarta had been given a personal undertaking by the minister, Ms Anne Warner, that his land would be returned to him.

Further south, Aboriginal interests were also confounding the formulation of new policy with the commission of enquiry into the conservation, management and use of Fraser Island and the Great Sandy Region. Mr Tony Fitzgerald QC had commenced this enquiry in March 1990. For the next fourteen months he processed submissions including a lengthy and contentious submission by the Department of Family Services and Aboriginal and Islander Affairs which outlined Aboriginal interests and options for management. The government appreciated that there was a need to set up appropriate consultation with Aboriginal groups regarding these new policy initiatives, particularly in relation to the proposed Cape York space base. The matter was not left to the Department of Family Services and Aboriginal and Islander Affairs. That department, together with the premier's department, commenced a review of Aboriginal land tenure late in 1990. The premier said this review would include an examination of all aspects of land claims, including basis for claims, competing land uses, appropriate processes by which claims might be made and conditions attaching to the granting of land. He said he was aware of the complexity and sensitivity of these issues and the importance of allowing sufficient time for all aspects to be fully explored: "To treat this matter superficially for the sake of expediency would not assist Aboriginal people in the long run and would generate further distress for a group whose circumstances had been disregarded for too long."<sup>5</sup>

In conjunction with his Fraser Island inquiry, Mr Tony Fitzgerald convened a national conference on public issue dispute resolution. Held in

the grand ballroom of the Brisbane Sheraton Hotel, it was attended by representatives of government and industry and a large consignment of Aborigines including fifteen representatives of the Cape York Land Council. Land council members attended a pre-conference seminar hosted by the Australian Conservation Foundation. Robert Holroyd, Noel Pearson and Francis Deemal put their case for land rights and land management to the conservationists. No Aboriginal speaker was on the agenda for the public issue dispute conference. However the Aborigines made their presence felt and on the last afternoon were invited to form a panel to answer questions from the floor.

Seeing the number of Aboriginal representatives present, Mr Goss made a surprise announcement that his government would legislate for Aboriginal land rights in 1991. Though the conference was focussed on solving environmental disputes such as Fraser Island, the Aboriginal advocates had been adamant these could not be resolved fairly and peacefully without due acknowledgement of their claims and interests. Mr Goss agreed and he did not mix his words. He made it clear that his government had come to power with a land rights policy and it would be enacted. Next day he met with Aboriginal leaders from all over Queensland and told them: "It's going to be a long road. It will be a long course of consultation. We have to balance the other claims. We have to accept the interests of miners, the environment, tourism, grazing - all the rest of these things. You have to go back and talk among yourselves and work out what you want. Tell us how it would work in practice. Don't come here and ask me, a white man, to draw it up because you will turn around and accuse of imposing a white man's solution. I'm not going to do that."<sup>6</sup>

There followed a barrage of emotional reaction in the Queensland parliament. Dire predictions of an "Aboriginal land grab" were countered by politicians' concerns for rising Aboriginal street crime. None of it was to the point. The carry-on left no one any the wiser about what was to be done under the banner of land rights and what were the real objections. There had been a temporary lull in the partisan politics of Aboriginal affairs with Mr Russell Cooper, the leader of the Opposition, having endorsed the Hawke government's initiative for reconciliation with Aborigines. He had written romantically about the Aboriginal relationship with the land and creation, telling Mr Hawke: "All Australians can benefit from such an approach with the end result being an increased national pride." But

Queensland was thrust back into the partisan knee-jerk politics of land rights. The National Party started a scare campaign about the ambit claims which Aborigines might make particularly to areas of land subject to pastoral leases which would become vacant crown land once a lease had run its term. While anxious to avoid fuelling any ambit claims, the government had to establish feasible gains which Aborigines might make under new land rights legislation. This would prove difficult because early in its term the Goss government had passed the Mineral Resources Act which had been largely formulated by the earlier National Party government and which reflected the policy of their predecessors. It did not give Aborigines any veto over mining on their land nor did it vest the sort of control over mining and the negotiating potential enjoyed by Aborigines in the Northern Territory.

### **3. Closed Door Negotiations**

The public service moved into top gear on 11 March 1991 with the setting up of an inter-departmental committee to determine policy regarding land rights. Noel Pearson from the Cape York Land Council was retained by the government as a special Aboriginal advisor. He was joined on the committee by another Aborigine, Marcia Langton, who had considerable experience with the Central Land Council in the Northern Territory and was now a member of the Senior Executive Service working with the Department of Family Services and Aboriginal and Islander Affairs. Officers from the departments of Premier, Economic and Trade Development, Family Services and Aboriginal and Islander Affairs, Land Management, Primary Industries, Environment and Heritage, and Resource Industries then met day and night, weekdays and weekends until 17 May 1991 finalising proposals for land rights legislation. Mr Goss had set up a new cabinet office headed by Mr Kevin Rudd who had diplomatic experience with the Department of Foreign Affairs in Canberra. Rudd headed this task force and was assisted by Mr Graeme Neate a lawyer from the Sydney firm Freehill, Hollingdale and Page. Neate had for some years been an in-house lawyer with the Commonwealth Department of Aboriginal Affairs. In that capacity he had been the prime minister's observer to a similar task force which had been set up in Western Australia during the Burke government's formulation of failed land rights legislation. This time there

was no question of the Commonwealth having an observer at what had come to be seen as a purely state process. Neate had also been a research assistant for Justice John Toohey the first Aboriginal Land Commissioner in the Northern Territory. He had assisted Toohey in 1983 in a review of the Northern Territory land rights legislation.

The interdepartmental committee had two tasks to perform. Each department was to coordinate its response to the announced land rights initiative. Then various persons were allocated to consult privately with the key groups and organisations having an interest in the outcome of the process. Kevin Rudd liaised with the industry groups including the Queensland Mining Council, the Australian Mining Industry Council, the Australian Petroleum Exploration Association, the Queensland Farmers Federation, the United Graziers Association, the Cattlemen's Union, the Queensland Commercial Fishermen's Association, the Queensland Canegrowers Association, the Queensland Canegrowers Council, the Queensland Timber Board, the Queensland Confederation of Industry, the Queensland Chamber of Commerce, the Queensland Metal Trades and Industry Association and the Queensland Tourist Industry Association. Later in the process he also liaised with the major environmental groups. Langton and Pearson provided advice as to the appropriate way in which consultation with diverse Aboriginal groups might be undertaken within such a tight time frame.

On 3 April 1991, Messrs Goss, Rudd and Neate accompanied Marcia Langton to Aurukun to meet with Aboriginal leaders from throughout Cape York. People travelled long distances by road from throughout the cape at very short notice to attend the meeting. Mr Goss told them: "You must not underestimate the fact that there are people in this state, very powerful groups, who will seek to frighten the general community, who will seek to use fear and ignorance to turn the general Queensland community against land rights legislation. They will seek to use fear and ignorance and prejudice to stop land rights laws from passing in this state."<sup>7</sup> He went on to seek the assistance of Aboriginal people, saying that if this initiative were to succeed the government could not do it on its own but would need them to explain that land rights was a good thing not just for Aborigines but also for Queenslanders generally. He insisted that Aboriginal leaders had a responsibility to explain to other people in Queensland that they had nothing to fear from fair land rights legislation and that land rights



legislation would contribute to a better life for Aborigines in the future. Marcia Langton was later very disparaging about the conduct of the government delegation at Aurukun. After she had resigned from the Senior Executive Service she wrote: "Most of the government delegation behaved like rich American peace corps kids on their first stint in the third world. They flinched and grinned, discomfited by culture and the shock of how the other half lives and, like the Americans in Vietnam, did not understand what they were looking at."<sup>8</sup> Mr Woompo Kepple, one of the traditional owners of Merapah station which had been handed over to the traditional owners the previous year, told Mr Goss that he would like the pastoral lease to be transferred into freehold. According to Langton, the premier snapped back at him: "I hope you're going to pay for it." Langton later said, "My heart sank. I felt Woompie's distress and embarrassment. The gulf of understanding between us and the premier was too wide."

Urban Aborigines thought it curious that the premier at short notice would fly to Aurukun to brief Aborigines in the remoter parts of the state about his intentions while he had not engaged in any discussion with them. Long time activist Mr Bob Weatherall from the Foundation for Aboriginal and Islander Research Action (FAIRA) had two weeks previously announced the establishment of the Queensland Aboriginal Federation of Land Councils (FLC) at Musgrave Park in Brisbane. He hoped this new organisation would give Queensland Aborigines a unanimous voice with their negotiations with government on land rights legislation. On 11 April, Bob Weatherall and other members of the fledgling FLC attended a meeting of the Aboriginal Co-ordinating Council in Cairns. They put forward a proposal for close liaison between the ACC and the forty land councils which it was hoped would be established throughout Queensland. Weatherall was anxious that any government recommendations on land rights be in the form of a public report which would be open for public discussion and debate. Others thought Weatherall alarmist when he claimed that the Queensland government was already formulating its legislation and intended to introduce it into parliament during the July sittings of 1991. No-one expected that by July the legislation would be two months old already.

Local government elections having been held earlier in the year, the ACC meeting at this time was newly constituted. As well as getting to know each other, new members had to dedicate themselves to workshops aimed at

producing and approving an ACC policy document on land rights. On 12 April 1991 Mr Les Malezer, the divisional head of the Aboriginal and Islander Affairs division of the Department of Family Services and Aboriginal and Islander Affairs, addressed the ACC in the presence of FLC members. In earlier times, Malezer had worked very closely with Weatherall at FAIRA. Malezer informed the elected Aboriginal councillors that there were people in the premier's department preparing draft legislation but that he was unable to provide information as he was not party to those deliberations. No public servant who was party to those deliberations was present and able to advise the ACC on the government's intentions. The ACC published its land rights policy which was very comprehensive. As well as calling for improvements in the existing DOGIT titles, the ACC recommended the establishment of a land acquisition fund and the statutory recognition of land councils. The ACC also called for an Aboriginal veto over mining activity of Aboriginal land.

Returning to Brisbane that day, Mr Weatherall issued a statement of concern claiming that "consultations regarding land ownership have been restricted to the north, in particular the Cook electorate".<sup>9</sup> Weatherall, whose sources of information have always been good, claimed "that the government have decided to restrict consultation from 22 April until 14 May so that legislation could be tabled during the June sitting of Parliament". He expressed concern about the political and moral dangers of such expediency. He had been informed that an options paper would be presented to cabinet on Monday 22 April.

#### **4. The Formalities of Consultation**

On 12 April there had also been an exchange of correspondence between Mr Goss and Miss Lois O'Donoghue, Chairperson of ATSIC, the Commonwealth's newly created Aboriginal and Torres Strait Islander Commission. The premier said that his government would be introducing land rights legislation and that the ATSIC structure was the legitimate and effective Aboriginal representative body to consult with on this matter. Goss sought a meeting with O'Donoghue and the Queensland ATSIC commissioners to discuss his proposed legislation. Though Lois O'Donoghue could not attend, the Queensland ATSIC commissioners did attend a meeting with the premier and his advisers including Marcia

Langton and Noel Pearson on 16 April 1991. The premier explained that his government was trying to work towards introducing land rights legislation as expeditiously as possible because of the danger of protracted debate causing apprehension in the community. To effect speedy consultation with local Aboriginal communities, he wished to use ATSIC regional councils which would be funded by the Queensland government for this consultation exercise. In the early part of the meeting the premier told the commissioners that he hoped to have legislation completed "by the end of this year".<sup>10</sup> Gerhard Pearson, ATSIC commissioner for the Queensland Far North and Communities Zone (and brother of Noel Pearson), expressed concern to the premier that there was a possibility of dividing urban and traditional Aboriginal people. He encouraged the premier to recognise ATSIC regional councils as the peak representative Aboriginal body. The premier said he was happy to utilise the services of the ATSIC regional councils but he did not want to cut himself off from other legitimate points of view. When asked by Commissioner Kerry Blackman from the Queensland South Zone whether the government was locked into introducing legislation by the end of the year, the premier replied that he thought it could be done by the middle of the year. According to the ATSIC minutes of the meeting, "he asked for understanding that what his government was doing was generally very unpopular with the electorate and because of this his government was not prepared to put everything else on its agenda aside while it fought through a land rights package".<sup>11</sup> The premier told the ATSIC commissioners that an options paper was being drawn up and that cabinet would consider the matter later in the week so that ministers could give guidance on discussions to be held with industry groups on land rights. Those cabinet discussions took place two days later.

Meanwhile Kevin Rudd had been doing the rounds with the Queensland church leaders. All meetings with church leaders took place at the instigation of government. The leaders made it clear that they were not interested parties to be consulted but they were happy to be informed of the government's intentions and they took the opportunity to express strong views about the need for consultation with diverse Aboriginal groups. Having attended a meeting between Mr Rudd and Archbishop Rush, I provided the premier with a list of principles and concerns about Queensland land rights legislation:

1. The Northern Territory legislation provides a model for communities on existing DOGIT areas. The New South Wales legislation provides a model for urban dwellers.
2. DOGIT legislation needs to be tidied up, placed in one Act, and the few remaining holes in the title need to be plugged.
3. A claims process ought result in the issue of a statutory Aboriginal title for claimable land which would include at least vacant crown land not required for other public purposes and for acquired lands when the Aboriginal owners want it transferred to Aboriginal statutory title.
4. The Aboriginal statutory title ought be inalienable and the special consent provisions of the Mineral Resources Act ought apply. Compensation payable under that Act ought cover disruption to social and spiritual relationships based on the land.
5. If the claims process and Aboriginal statutory title are not to apply within towns and cities, there ought be a statutory fund and process for land acquisitions. Otherwise urban dwellers (who are the majority of dispossessed Aborigines living away from DOGIT lands) will have nothing to gain from the land rights initiative.
6. If there are to be no excisions from existing pastoral leases, the acquisitions programme should be well enough resourced to allow purchase of cattle properties and other lands in rural areas providing economic potential for small isolated communities.
7. Acquired lands should be subject to ordinary Queensland titles, unless the owners qualify and apply to have the lands transferred to Aboriginal statutory title.
8. A fast track, minimal consultation legislative programme should be embarked upon only if those Aborigines who have least to gain from the process endorse it with the understanding that they stand to gain more than from a protracted, blood-letting consultation, negotiation and public debate with vested interests. The Aboriginal Co-ordinating Council, being the government's only statutory body, should be formally briefed and consulted.
9. If there is to be minimal disruption to the interests of miners, pastoralists and non-Aboriginal town dwellers, the legislation, administrative infrastructure and guaranteed recurrent budgetary assistance should provide something for all Aboriginal groups in Queensland. Otherwise the package will be perceived as an elaborate window dressing operation involving little

extra land being really controlled by Aborigines, and clearing the path for the doubling of the national park estate.<sup>12</sup>

As well as considering legislative options at their meeting on 18 April, the ministry must have decided to expedite the legislation even more quickly. After his meeting with the ATSIC commissioners, Mr Goss had written a personal letter to the chairperson of each Queensland ATSIC regional council asking for their assistance with consultation on land rights legislation. He had said "the participation of Aboriginal and Islander people in the development of the government's policy is important. In the determination of the proposed land rights legislation my government seeks to be guided by the views and aspirations of your people." He invited each council to consult with the government on the development of legislation and to assist in the process of communicating to the government the views and the aspirations of people of each region. He said, "My government believes that as the ATSIC Regional Councils have been democratically elected by Aboriginal and Islander people, your council is the most appropriate body to advise on a consultation program for the people of your region."

After the cabinet discussions of 18 April, ATSIC Regional Councils received a follow-up letter from the premier's department on 19 April 1991 indicating final submissions from Aboriginal groups would have to be received by Friday, 10 May 1991. Despite the calls of Aboriginal groups and the urgings of church leaders and others, the government had decided that legislation would be immediate. Options had been taken without the benefit of Aboriginal views and aspirations. Nonetheless the government immediately committed \$190,000 for ATSIC regional councils to convene meetings. Also the government provided funds for the employment of nine regional consultants who could work with regional councils assisting them in the compilation of their submissions.

Having decided to move quickly, the government then aired a theory in the media that there was a need to legislate quickly so as to avoid any adverse impact from the litigation in the High Court instigated by Eddie Mabo. His case was to commence hearing on Canberra on 28 May 1991. Having become involved in the land rights campaign not only as advisor to the Catholic bishops but also at the request of ATSIC, the ACC, the

Federation of Land Councils, the Cape York Land Council and FAIRA, I wrote to the premier on 23 April 1991:

I appreciate there is a difference between an 'in house' government consideration of options for legislation and a public consultation process. The former can, and perhaps ought, be carried out promptly and in confidence. However once government has set the parameters on the options it is prepared to consider, it is essential that major parties to be affected by such legislation be granted the opportunity to contribute to public discussion and to make detailed submissions to government. Even more so, it is essential that Aboriginal groups whose aspirations for land title may be excluded by such legislation be given the opportunity to put their case.

If public consultation is to be cut short so as to minimise the risk of public agitation by miners, pastoralists and the Opposition parties, Aboriginal leaders ought be informed and given the opportunity to express their viewpoint on a truncated process. Especially if the outcome of the legislation is to contain minimum disruption to the interests of miners, pastoralists and other landholders, Aboriginal groups need to weigh up for themselves the trade-off between fast legislation which may grant marginally more rights over against legislation after consultation which may result in further gains to miners and pastoralists and losses to Aborigines.

Your government has a reputation for exhaustive consultation before legislative reform through processes such as EARC. Mr Rudd compared land rights reform with changes to the law regarding homosexuality which was effected by prompt legislative action with minimal consultation. The analogy miscarries because land rights legislation of any substance must effect a new balancing of rights between conflicting land users and potential users. The balance can be rightly struck only after a careful weighing of all conflicting claims, all parties having had the opportunity to put their case. Withdrawing criminal sanctions from behaviour between consenting adults when there is no direct threat to the rights of others (though there is arguably an effect on the common good) is a very different exercise from legislating a new regime of rights which will advantage some citizens and correspondingly 'disadvantage' others. The latter requires, first, that the balance be rightly struck. That can be guaranteed only once there has been a full consideration of all conceivable classes of conflicting claims. Though your government has the benefit of advice from departments which are fully equipped to advise on the

aspirations and concerns of miners, pastoralists and national park officials, you do not have the benefit of a department able to advise on the extent of Aboriginal interests in land. Because of your predecessors' policies in government, the only department which could have developed such expertise long regarded such knowledge as an irrelevance or even as ideological construct. In the sixteen months since you have come to office, that department has not had this opportunity to assess all possible bases of claim. Second, any new balancing of rights needs to be owned by those whose interests are or ought be affected, especially by Aborigines who may gain least. The outcome will be owned only if they can own the process.

When Aboriginal leaders had been told on 19 April that their final submissions would have to be lodged by 10 May, they could not be told whether or not they would even be presented with a discussion paper or list of options. The government's unexplained rushed timetable was now producing considerable disquiet especially among Aboriginal groups who feared that their interests would be disregarded. Journalist Peter Charlton wrote a major piece in the *Courier Mail* on 20 April 1991 espousing the theory that the rushed timetable was directly related to the Mabo litigation. In my letter to the Premier on 23 April, I said:

I have continued to assure Aboriginal groups that that your haste could not be related to the Mabo litigation, Mr Rudd having assured Archbishop Rush and myself that it has been prompted only by the need to avoid political haemorrhaging, the need to legislate before government moves into election mode, and the need to address Aboriginal land claims before finalising the increased national park estate as promised in the election campaign.

Once you and your Cabinet have set the parameters or options, I urge disclosure of those options to the various key Aboriginal leaders. If they judge those options acceptable and if they are fully apprised of the government's reasons for seeking prompt legislative action, they may well agree to the fast-track approach. If not, I urge the publication of a discussion paper permitting at least three months for consultation and presentation of submissions, bearing in mind that the less threatening are your options to the miners and pastoralists, the less likely will they be to agitate against them.

At the moment, most Aborigines are completely excluded from the process and ignorant of options and government motivation. They need to own the process if we are all to own the outcome as a just and proper settlement.

That day Lois O'Donoghue also wrote to the premier stating that the consultation timetable proposed could not be regarded as adequate. Her councillors had received no information about the possible nature and coverage of the legislation. She urged Mr Goss "to make the point to the councils that it would not be realistic to expect that all our people's aspirations in relation to land can be met by a single process". She suggested a meeting of the ATSIC commissioners with the premier at their next scheduled meeting during the week commencing 2 June "but if necessary we could consider special arrangements to deal before hand with this most important issue". Mr Goss did not meet again with any ATSIC commissioners. On the same day Mr Bob Weatherall wrote to the premier seeking a meeting between himself and a delegation of four representatives from FAIRA, the Federation of Land Councils and the ACC. No meeting was granted. By the end of that week the Queensland ministers made most of the policy decisions regarding their options for legislation.

Anne Warner who in earlier years had been arrested for her part in demonstrations agitating for Aboriginal land rights was now minister for Aboriginal affairs. She was not winning many battles around the cabinet table and was increasingly locked out of the processes of the inter-departmental committee. On Saturday 27 April, Peter Morley, the *Courier Mail's* experienced columnist on state politics, described her enforced distancing from the consultative and legislative process as "George Street's worst kept secret in recent months". He described the week's ministerial meetings in these terms: "Depending on who is contacted, the debate at these meetings ranged from vigorous to heated to blood on the floor. Accepting that it was heated then, the atmosphere was probably torrid and voices were raised as ministers put competing interests about mining and the environment". According to Morley, Goss was very blunt saying that land rights was not going to be like winning the casket and people could forget what amounted to ambit claims. Goss was adamant that there be no mineral rights. Further Goss knew that it would be difficult to package a new land rights deal because he believed the National Party got it nearly right with deeds of grant in trust.



Though most decisions had been made, the government went ahead and paid \$190,000 to ATSIC for Aboriginal meetings to occur between 1 and 10 May 1991. Bob Weatherall wrote again to Mr Goss saying that his government's "covert actions to date on the land rights issue are reminiscent of the National Party. Your government's proposed land rights legislation can only be interpreted as token gesture to ameliorate your party's policy. We are appalled that the time frame for consultation on this pre-determined model has been reduced to a matter of weeks."<sup>13</sup> By the end of the consultation period, the government had paid out \$300,000 to ATSIC. Having made its key policy decisions, the government decided not to issue any discussion paper to Aboriginal groups. Industry groups were fully briefed by Mr Rudd on the proposed options. Aboriginal groups were left in the dark. Public servants attending a meeting at the premier's office on 30 April 1991 were then provided with a two page summary of the proposed options. This summary stated: "Please keep this information confidential. If any material leaked can be traced back to this meeting, the opportunity for further consultation and input is likely to be diminished. This report covers the key issues and options being addressed in proposed land rights legislation." This was the day before the ATSIC regional councils were to commence their funded meetings so as to provide input to the government on Aboriginal aspirations, the government having said that it sought to be guided by the views and aspirations of Aboriginal people as expressed through regional councils.

Anne Warner was at Elim Beach, north of Hopevale in Cape York, meeting with the Cape York Land Council. She told the people, "It's not a matter of what you want - we know that. It's what you'll accept." The Cape York Land Council then issued a communique to the christian churches in Queensland saying "the time period which has been set by the state government for consultation with Aboriginal groups is not enough to allow our people to properly understand the proposals and to have meaningful input into the legislation."

## **5. Aborigines Divide on Tactics**

A major land conference was then held at the Ramada Resort north of Cairns sponsored by the Australian Institute of Aboriginal Studies and organised by Yalga-Binbi, a training Institute of the Uniting Church. Two

hundred representatives attended. ATSIC commissioners, Marcia Langton, Noel Pearson, and members of the premier's staff were also in attendance. Much time and energy were expended in debate between Bob Weatherall and Marcia Langton as to whether or not Langton should resign given the unavailability of information about the legislation's content and given the very restrictive consultation process which had been allowed to Aboriginal people. The meeting expressed its confidence in Langton.

There was no agreement on tactics given the short time frame and limited input which Aborigines were being permitted so as to influence the government's consideration of options. By this time the Cape York Land Council, the Federation of Land Councils and the Aboriginal Coordinating Council had all prepared written submissions regarding land rights. There was much common ground. Though there was intense disagreement amongst the Aboriginal leaders about tactics, there seemed to be considerable agreement about the areas of shortfall in what was known of the proposed legislation. In the hope of publishing an agreed statement by all key Aboriginal organisations of the state, the organisers commissioned me to prepare a draft resolution which was circulated on Saturday 4 May:

Communities living on DOGIT areas require "inalienable freehold" title of their lands. This title should include timber and quarry rights. The boundaries should extend to the low water mark. The community should have a veto power over mining which can be overturned only by decision of the parliament. Royalty equivalents for minerals extracted from the land should be paid in full to Aboriginal groups affected by mining. Compensation for mining on the land should include payments for disturbance to religious and social relations based on the land. Trustees of DOGIT title should be elected community councils or representatives of traditional owners, the choice being made by referendum of the community. DOGIT land should have boundaries which are kept intact. Excisions for crown buildings should be replaced by permissive occupancy for as long as such buildings are required for the delivery of services by government departments.

The communities at Aurukun and Mornington Island ought be granted inalienable freehold title to their lands presently subject to 50 year leases. These communities ought retain their right to share in profits from mining on

their lands. Aboriginal reserves ought be transferred to Aboriginal land trusts and changed to inalienable freehold title.

All vacant crown land (including such lands in towns and cities) which is not required now for public purposes ought be available for claim. Such land subject to occupation licences or permission to occupy should still be available for claim. Land successfully claimed on the basis of traditional or historical association ought be made inalienable freehold. Land claimed on the basis of need ought be granted as ordinary freehold, not as special purpose leases. National parks ought be available for claim on the basis of traditional or historical association. Such parks could then be leased back and managed by boards which have a majority of Aboriginal owners. State forests and timber reserves ought be available for claim. Stock reserves and stock routes should be available for claim unless they are still in use. Routes in use which cut through claimable land should be re-routed.

Where there is conflict about a proposed claim on the basis of traditional or historical association or need, the matter should be referred to an independent tribunal whose recommendation to the government should be published with reasons. Legal aid should be available for Aboriginal claimants appearing before the tribunal. The tribunal should be chaired by a judge or independent lawyer. The majority of other members of the tribunal should be Aboriginal.

The ALP's promised Community Development and Heritage Fund should be set up by statute, providing a guaranteed share of state revenues, such that an additional \$40 million per annum can be allocated to Aboriginal land acquisitions and development programmes as has been the case in New South Wales under all governments since 1983. The fund should continue until at least 6 June 2009, the 150th anniversary of the establishment of the colony of Queensland.

Aborigines having a traditional or historical association with private land ought be able to apply to a court for access for hunting and gathering purposes so as to review the landholder's unreasonable refusal of consent.

There needs to be a statutory Aboriginal agency independent from government which can assist Aboriginal claimants and resource Aboriginal landholders. The Commonwealth should rectify any shortfall in the Queensland proposals, especially by providing funds to the ATSIC regional land funds and by allowing ATSIC regional councils to employ staff.

The government must allow sufficient time for the scheduling of all immediately grantable and claimable lands before the passage of the

legislation through parliament. If the legislation is not to provide for a lands acquisition fund and programme, it should not be called the Aboriginal Land Rights Act but the Aboriginal Crown Lands Reallocation Act. The land legislation should not have a time limit.

Temperatures were so frayed that the draft resolution was never discussed. The conference ended with much bad blood among Aboriginal leaders and no agreed statement of their position to the government. The government's sham consultation arrangements had ensured a division of Aboriginal opinion about tactics, even when there was agreement about outcomes. The ACC and FLC representatives boycotted the end of the proceedings. When the minister met with them the next day she was unable to grant them an extension of time for their submissions. It was clear by this stage that the content of Aboriginal submissions would be used by government in so far as they complied with the options which had been determined behind closed doors. In these circumstances Aboriginal submissions could be quoted as evidence of the government's attentiveness to Aboriginal views and aspirations. Insofar as Aboriginal submissions went beyond those options, they would be viewed as ambit claims irresponsibly drafted or, at least, drafted with insufficient regard to present political contingencies. The consultation process was a farce.

In the end, ATSIC regional councils were told that they could have another week to prepare their submissions. However it was known that the legislation was already at the drafting stage being fine tuned by Graeme Neate back at his Sydney office. Noel Pearson resigned his commission with the Queensland government. By this time all major industry groups were locked in. The government's tactics had worked well. A land rights package would be delivered without criticism by major industry groups. Expected criticisms from Aborigines would confirm the view of the electorate that there really was very little to fear in this land rights package. The premier and his advisors were concerned with outcomes and with maintaining the government's good standing in the eyes of the electorate. They were prepared to trade process for outcomes.

Mr Russell Cooper, the leader of the Opposition, later told parliament that the legislation was drafted "in conjunction with producer groups, the mining council and other bodies throughout the state". Industry representatives told him that "unless they accepted this

legislation, they were going to cop land rights legislation in its entirety, which meant getting something similar to the Northern Territory model". The government had told industry that "unless they supported this legislation, that is what they would get".<sup>14</sup>

Government representatives had attended ATSI regional council meetings throughout the state but only two of the ten regional councils decided to provide written submissions to government. Mr Rudd was unavailable to meet with Mr Phil Donnelly the state manager of ATSI. However the premier's department did express the government's appreciation for ATSI's assistance in "enabling officers of the Queensland government to meet with regional councils". The department thought the process had been "an extremely useful exercise and had resulted in the lodgement of a substantial number of submissions of high quality".<sup>15</sup> ATSI commissioners and senior officers of the ATSI bureaucracy were very disturbed by this stage that ATSI was being used by the government to engage in a sham consultation arrangement. Though the government had provided no written materials to ATSI regional councils for consideration in their consultation, ATSI commissioners had been told that the briefings they had received from Queensland government officials and their discussion with the premier were to be the main conduit both for communicating to local Aboriginal local groups the government's intentions and providing responses from local Aboriginal groups. Lois O'Donoghue wrote again to the premier on 16 May expressing her own concerns about the lack of substantive information and the lack of time for a satisfactory programme of consultations. She said the government's timetable "could not be regarded as adequate". She was insistent that at no time had ATSI received information "which might be regarded as describing the nature of the land rights system that might be in contemplation." She warned, "Should your government proceed with the introduction of land rights legislation on the basis of the present program of discussions, it will not be possible for it to claim that the legislation reflects the outcome of a process of consultations that has met the wishes of Aboriginal and Torres Strait people." Mr Goss made no reply to either letter until 3 July 1991 when he said that ATSI "was to act just as a facilitator for the regional consultations" and that the legislation since enacted provided "a significant advance for Aboriginal and Torres Strait Islander Queenslanders". Anne Warner later told parliament that "the government

took the view that prolonging the process of consultation would achieve little".<sup>16</sup> She pointed to the precedents of the Aboriginal Land Rights Bill in New South Wales in 1983 and the breakdown of proposals for Aboriginal land rights in Victoria.

On Monday 20 May 1991 Mr Goss announced the detail of the proposed land rights legislation. By this stage Marcia Langton the only Aborigine still party to the closed door proceedings of government was very dispirited. Later she said: "Our brief was to explain to Aboriginal people the cabinet preferences in respect of complicated legal matters in each major area of the proposed land rights legislation without any documents except for an agenda. No Aboriginal group was to receive anything in writing. We were required to put to Aboriginal councils a set of options which had already been decided against Aboriginal interests, behind our backs."<sup>17</sup>

Those options were spelled out by the premier at his press conference on 20 May after a cabinet meeting endorsing the options paper. He described the proposal as "modest, balanced and responsible". So as to appease those interests opposed to land rights, he said, "We rejected out of hand the Northern Territory approach as being too radical both in the way it affects the community generally and the specific impact on agriculture and mining."<sup>18</sup> Answering questions from the media, Mr Goss said the proposals were designed to encourage Aborigines "to get up on their own two feet and support themselves". He said, "As someone who has visited the community in isolated parts, they are in the main a very depressing sight. What we see in many Aboriginal communities is a depressing cycle of drunkenness, violence and disease propped up by tens of millions of dollars of taxpayers' money year in and year out".<sup>19</sup> Not only was Aboriginal consultation an irrelevance to the government's decision making process, the sensitivities of Aborigines were to be overridden in the announcement of land tenure proposals purportedly being made for their benefit. All this in the name of being able to sell the package as reasonable and modest to a suspicious electorate. The premier's media release contained a ten page briefing paper and several attachments which were drafted in such a way as to assure non-Aboriginal readers that they had little to fear. This paper was so effective that the government then saw the need for publishing another paper entitled "Gains for Aboriginal people under the proposed Aboriginal Land Bill 1991". These papers were

the first detail available to Aboriginal groups and contained surprises even for caucus members.

Aborigines throughout Queensland were devastated by the premier's remarks about drunkenness and violence. Mr Jeff McLean, chairperson of the Aboriginal Co-ordinating Council, issued a statement saying "the government is not 'fair dinkum'. They might as well have saved their time and money and not set up a social policy unit in the premier's department for all the use their land rights policy is. It's a 'Claytons' land rights bill, the kind you have when you don't have land rights".<sup>20</sup>

The opposition had a field day in parliament bringing on a matter of public interest debate. Mr Douglas Slack, the opposition spokesperson, outlined his understanding of the premier's desire to placate the miners and the general constituency. He labelled it "the action of a good, sensible, conservative premier". Marcia Langton and Noel Pearson were left as the meat in the sandwich. Slack told parliament that "to manage it carefully, a decision was made to form a large consultative committee to lock some of the more outspoken people into it, to pay them a big consultative fee, and they should support the government. It is my understanding that Noel Pearson was being paid \$750 a day, plus expenses."<sup>21</sup> Slack said this came unstuck when Pearson resigned, Pearson not being able to be bought or placated.

Next day the premier tabled in parliament Mr Tony Fitzgerald's report of Commission of Inquiry into the Conservation, Management and Use of Fraser Island and the Great Sandy Region. This inquiry had been running for fourteen months. Mr Goss told parliament, "As I have said on numerous occasions, governments that set in train processes which are comprehensive, orderly and fair at some public expense, should not do so unless they intend to base their decisions on the outcome of those processes. This government was fully committed to the commission of inquiry, its staff and its work. Now that it is completed, the government will base its actions on the recommendations and the material considerations of this report."<sup>22</sup> The difference in approach to consultation and policy formulation could not have been more stark. The Aboriginal consultation on land rights had definitely been undertaken at some public expense. There was no way that it could be comprehensive, orderly and fair in such a limited period of time. Prior to Aboriginal

consultation, the government predetermined its policy, using the consultation process as a formality which might reveal some convergence between the policy and the views and aspirations of Aborigines. Defending the land rights consultation process at question time that day, Mr Goss acknowledged that some people would have liked it to have gone on longer. While this was understandable, he said the time had come to act because "there have been a million seminars and conferences and decades of debate". He said "the government had made the decisions necessary to balance competing requirements for consultation and action and had weighed up the interest of various groups. The result was that in the near future, a legislative proposal will be put before this house". That legislative proposal was tabled nine hours later. It would have been earlier only the printing presses had broken down. Anne Warner was left to introduce the legislation at 12.54 am.

Matters had been so rushed that the ALP caucus was unaware of the proposals until the premier's press release of 20 May 1991. When caucus met on 22 May 1991, caucus members including Mr Matt Foley, a long time advocate of Aboriginal causes, listed their minimum concerns. Some caucus members wanted to increase Aboriginal control over mining on land. They also wanted the legislation to reflect the government's stated commitment to providing funds for land acquisitions especially for Aborigines in urban areas who otherwise would be unable to claim land. Caucus members also agitated for greater Aboriginal control and representation on boards of management of national parks which were gazetted on Aboriginal traditional land. In the end five proposals were unsuccessfully put to the vote in caucus. The government was not to be moved on the options it had adopted. The only minimal gain made was that appeals from the proposed Aboriginal land tribunal would lie to the Land Appeal Court rather than the Land Court. The government was not prepared to legislate for the establishment of land councils which could provide legal and other professional assistance to Aboriginal claimants and Aboriginal land owners dealing with development proposals on their land.

Parliament sat again on Thursday, 23 May 1991. Aborigines processed through the streets of Brisbane and then demonstrated outside Parliament House. The Speaker, Mr Jim Fouras, who had been a great supporter of Aborigines when on the front bench of the ALP opposition



sent out sandwiches to the demonstrators and wished them well. The premier was not available to go out and meet the demonstrators. Members of the Cape York Land Council then met with the premier and his advisors. The meeting was very heated and broke up when Aborigines left the room. There was some prospect of another meeting the next day to negotiate amendments. However the government cancelled that meeting. The Cape York Land Council, the Federation of Land Councils and the ATSIC commissioners decided that there was little point in trying to negotiate minimal amendments with a government which had secretly drafted legislation while purporting to await the findings of a detailed Aboriginal consultative process within a very tight time span. Meanwhile the executive of the Aboriginal Co-ordinating Council decided to proceed with requests for some amendments. Church leaders met again with the premier on 27 May 1991. On behalf of the ACC executive, I discussed proposed amendments with Messrs Rudd and Neate on 28 May 1991. The government agreed to some amendments immediately, while others were not to be passed by parliament until November 1991.

The day before the scheduled parliamentary debate on the legislation, a second major Aboriginal demonstration occurred. This time there was conflict between Aborigines and police and the gates of Parliament House were knocked down. The Australian flag was taken down and replaced by the Aboriginal flag. The previous day, Mr Fouras had commended the police for their behaviour during the first demonstration saying they had acted "with tolerance and in an impeccable fashion". He congratulated them on the way they had done their job.<sup>23</sup> Mr William Prest, the government whip who was later to come to prominence for his famous "gin-jockey" remark about Mr Bob Katter in parliament, asked the premier about the government's response to the latest demonstration. The premier said the behaviour of the demonstrators was unacceptable but he turned the matter on the members of the opposition saying that they had long debased the institution of parliament during their years on the treasury benches and "yet they have the hypocrisy to talk about people outside this place debasing this institution".<sup>24</sup> Mr Goss said the demonstration was a matter "for the Speaker and the police, and an appropriate response has been forthcoming."<sup>25</sup>

## **6. The Parliamentary Debate**

Nine hours before the introduction of the legislation, Mr Goss, in answer to another question from the government whip, Mr Prest, gave details of the consultation process. The government had targeted six groups in the process: the mining industry, pastoralists, industry organisations, churches, Aboriginal and Torres Strait Islander groups and conservation organisations. Church leaders had expressed the view that it was not for them to negotiate the legal entitlements of Aborigines. They were grateful to be briefed by the premier and his officers on the intended course of action but at all times had made it clear that they did not see themselves as parties to be consulted. However, Mr Goss told the Parliament that the church leaders had been consulted. Like all other parties consulted, they were said to be "happy with the consultation process, which has been exactly the same in relation to all parties". This was not the case. Mining, pastoral, and conservation organisations received far more detailed briefings on the proposed legislation than did church leaders. Those organisations were consulted and negotiated their interests. Church leaders had always made it clear that they were happy to be informed but they were not parties to be consulted in circumstances in which Aboriginal groups were not being apprised of the government's intentions. At no time were church leaders provided with the sort of detail necessary for other parties to negotiate their position. Church leaders continued to express profound concern about the consultation process and legislative timetable, seeing them to be very rushed, allowing little time for Aborigines to put their case after mature reflection and even less time for an analysis of the legislation. The church leaders did ask the government to provide the resources needed to explain the legislation more effectively to remote Aboriginal communities and that it consider amendments once those communities had the opportunity to see the legislation applied to their local situation. In her second reading speech, Anne Warner repeated the premier's claim that churches were one of the groups "consulted in the development of this legislation".<sup>26</sup>

Justifying the truncated consultation process, Warner said "the government took the view that prolonging the process of consultation would achieve little". Taking the lead from the premier, she was anxious to point out how conservative the legislation was, plugging the few

remaining gaps in the DOGIT legislation, making unwanted vacant crown land outside towns and cities available for claim, and making no change to the balance of rights and interests between Aboriginal land holders and miners. Though landholders would have the power to withhold their consent to mining, "if, for whatever reason consent is withheld the Governor-in-Council may overturn any refusal by Aboriginal land holders and approve the application". As Mrs Warner said, "Clearly the powers of the Governor-in-Council would be used judiciously and responsibly in the public interest. These consent provisions were negotiated between the mining industry and the previous Queensland government at the time of drafting the Mineral Resources Act 1989."<sup>27</sup>

During debate on the bill, Mrs Warner confirmed that "the legislation was not the government's last word on land rights".<sup>28</sup> This was the only major concession the urban Aboriginal groups were to win from the government. The government made much of the provisions rectifying the outstanding defects in the DOGIT. It was as if the curing of these defects took the old title across some magical threshold rendering it "inalienable freehold". The political kudos earned by government for these changes was somewhat dimmed when the Opposition spokesperson, Mr Douglas Slack, said:

The Opposition believes there are some positives attached to the legislation and there are some provisions which we support. The legislation before the house allows for timber and quarrying rights in the DOGIT areas. It also rectifies a failing in relation to the transfer of leases within DOGIT areas. The Opposition supports this and, as previously indicated, the National Party was moving to correct those anomalies. We accept that that should have been done. We also approve of the government's decision to hand over areas of land previously held for Aboriginal people by the Department of Community Services. This would have been done by the former National Party government; however, we had problems finding a suitable title for the land in question, in particular a title that would allow for some flexibility of usage.<sup>29</sup>

Though the government had locked in the miners and the pastoralists, the opposition in parliament had come to the conclusion that their support was "on the basis that the legislation does not appear to pose a

threat to their particular industry".<sup>30</sup> The publication of the government's second briefing paper, which highlighted the benefits for Aborigines, had caused some concern. During her consultation with Aboriginal groups, the minister had raised expectations that some pastoral land could be gazetted as available for claim once the pastoral leases had expired. However this hope was dashed when the Opposition spokesperson Mr Slack told parliament that he had approached the minister in this regard and she had given him "an assurance that it is not the government's intention to re-gazette expired leasehold land to enable it to be open to claims by Aboriginal people".<sup>31</sup> The Minister for Land Management, Mr A. G. 'Bill' Eaton, having said that the legislation would strengthen the title to the existing 3.1 million hectares of Aboriginal land (1.8 per cent of the state), went on to intimate that most, if not all, vacant crown land outside towns and cities and most, if not all, national parks would be gazetted as being available for claim. He said, "By making vacant crown land available for claim we will be releasing an estimated additional two million hectares, or approximately up to one per cent of the state. By making national parks available for claim, we will potentially be making up to a further 3.84 million hectares available for claim, or up to 2.2 per cent of the state. That area may increase if more land is acquired for national park purposes."<sup>32</sup> However no land is claimable until it has been gazetted.

It is highly unlikely that land will be gazetted unless it is not required by any government department now or in the foreseeable future. Furthermore, given the cost of instituting boards of management and management plans for national parks, it is very unlikely that all national parks will be made available for claim. The more likely course is that a few national parks at any one time will be available for claim depending in part on availability of funds for constituting a board of management.

Mr Patrick Comben, the Minister for Environment and Heritage, conceded that some people might be concerned about which parts would be gazetted as available for claim by Aborigines. He assured the House "that there will not be a flood of gazettals, as both the Aboriginal people and my Queensland National Parks and Wildlife Service staff are insistent that what is important is that we do it properly and this will need a major commitment of scarce resources".<sup>33</sup> He also dashed any hopes Aborigines may have had of growing rich on the takings from national parks. Any funds generated by the parks will go back to manage the parks and provide

employment and facilities. Furthermore "additional funds will be sought to cover any costs associated with the establishment and management of the parks so that management of the other national parks is not jeopardised."<sup>34</sup> Given that it will take some expenditure to set up any Aboriginal board of management, there will not be any gazettal of a national park unless and until there has been additional budgetary allocation made for the requisite board and plan of management. Rather than the threat of any floodgates being opened, it is a question of how soon the trickle of gazettals will commence.

The unfamiliarity and lack of commitment by the caucus to the legislation and its discomfort with the consultation process were highlighted during the parliamentary debate. In addition to the three ministers whose portfolios were most closely affected by the legislation, only six of the thirty-six Labor backbenchers spoke in the debate. Meanwhile seventeen of the twenty-six Nationals spoke and two of the nine Liberals. Despite the government's lack of speakers, Mr Matt Foley who had led the charge in caucus for greater recognition of Aboriginal rights and aspirations, was not permitted to speak for more than the allocated time. Another Labor member, Ms Molly Robson, had moved that he be further heard in accordance with the standing orders. However she withdrew the motion after there had been discussion between the deputy speaker and the minister.<sup>35</sup>

At the urging of the Aboriginal Co-ordinating Council, the Opposition agitated strongly against the proposed amendments to the trustee provisions for deeds of grant in trust covering the existing community lands. Under the amendments of May 1991, the elected council would no longer necessarily be the trustee of the community lands. There was to be a determination by the minister as to who the most appropriate trustees would be. The ACC was explicit in its submission to the government asking that the trustees of DOGIT areas not be changed unless the change was sought by the community residents in a referendum proposed by the community council. If by majority a community had sought such change, the ACC asked that the government then consult with the community and ensure the new trustees were representative of all major traditional land holding groups in the area. The final structure of the trusteeship was to be first approved by a community council before the minister presented it to the Governor-in-Council for certification. Even if

there were a request for a change in the trusteeship of community lands, the ACC insisted that community, residential and administrative areas should remain vested in the elected community council.<sup>36</sup>

Though the ACC was the only Queensland body having a statutory function to make recommendations "to the Minister and the Director General concerning matters affecting the progress, development and well-being of Aborigines"<sup>37</sup>, the government decided to use the ATSIC regional councils as the primary consultative mechanism with Aboriginal groups. The ACC was not even listed in the document on consultation tabled by the premier in Parliament on 22 May 1991. Neither was it on the list of Aboriginal organisations to be consulted by officers of the relevant departments and by Mr Noel Pearson, the government's hired Aboriginal consultant.<sup>38</sup> The opposition was of the view that the change in the trusteeship arrangements would render the land title a mere tenancy at will, given that the minister had the power to appoint and dismiss trustees whereas previously these trustees were elected by the community residents.

Defending the legislation, the minister insisted that her powers were tightly confined and that she could not exercise the power to remove, suspend or appoint trustees until she had first consulted with local Aboriginal residents and those who had an interest in the land under Aboriginal tradition. The statute required that she exercise her powers as far as practicable in a way consistent with any Aboriginal tradition applicable to the land concerned.

The ACC's anxiety and the opposition's criticism were heightened by the ambiguity of what constitutes Aboriginal tradition in communities which have been forced together on land which was not traditionally theirs but which has now become the only land with which the residents readily identify. Mr Bob Katter, who had introduced the National Party's Land Holding Act, took Palm Island as a case in point: "There must be some traditional owners of Palm Island. One can imagine the sort of venomous infighting, racial squabbles and, if you like, tribal squabbles which will occur on that island when the people who have lived there for three and four generations suddenly see the right to own their own home on Palm Island assailed by people who have probably not lived there for two or three generations. I am told that many of the original owners of Palm Island live in places such as Cherbourg and Woorabinda."<sup>39</sup> The state's most senior National Party member, Mr Bill Gunn, labelled the legislation a fraud and

said, "It would have been better to leave the legislation and fine tune the DOGIT. That was the intention of the government at the time the legislation was introduced. I can well remember that."<sup>40</sup>

Despite the appearance of an open letter to the premier by many prominent Australians on the day of the debate, the government refused to postpone the legislation's passage and sat through until 2 am passing the bill through all stages. The ALP pursued the same course as its National Party predecessor, preferring to rush the legislation through with minimal amendments and legislating more substantive amendments some months later when the heat was off. As with the Community Services legislation in 1984, Aborigines sat up in the public gallery until the wee hours of the morning hearing the elected "white fellas" down below setting out their social theories about Aborigines, spicing their speeches with anecdotes about the good "real Aborigines" they had once known. There were the usual heartfelt cries denying guilt for the past when no such allegations had been made, and calling for the people of Queensland to forget the past so everyone could be treated the same.

There were also signs that the ground of the debate was moving. National Party members admitted there were some defects in the old deeds of grant in trust which needed to be plugged. Responding to calls from the ACC, the opposition debated strongly the provisions which vested discretion in the minister to determine who the trustees of traditional lands might be. They thought these provisions paternalistic, anti-democratic, and contrary to self-determination. The opposition justifiably made much of the deficiencies in the government's consultation process. They were bemused by the government's capacity to get the miners and pastoralists on side while alienating every major Aboriginal organisation in the state. Much was made of the open letter to Mr Goss which had been published in the Brisbane *Sun* that morning and which was signed by FAIRA, the Aboriginal Co-ordinating Council, the Cape York Land Council, leading Aboriginal figures from Queensland and inter-state, an ATSIC commissioner and the ATSIC state manager.

When it came to the substance of the bill, the opposition had to abandon its two-bob-each-way approach of saying that the government gave too little thereby raising Aboriginal expectations and that it gave too much by failing to treat Aborigines just like all other Queenslanders. When it came to the crunch, the opposition unsuccessfully moved that no land be

claimable other than existing reserves and community areas. The minister, Anne Warner, conceded there were limits to what Aborigines could obtain from the legislation. Some of the government backbenchers, especially Matt Foley, were at pains to indicate the historic nature of the legislation, but that it was just a start, a foundation for a just and proper settlement between the two legal systems which have conflicted on Queensland soil during the last two centuries. The government did agree to some sensible amendments proposed by the executive of the ACC. Putting the consultation process behind it, the government was keen to convince Aborigines in the gallery that the legislation, combined with departmental resources and acquisition funds made available from time to time, could meet the legitimate land aspirations of all Queensland Aborigines whether they be urban dwellers or the traditional owners of Cape York.

The lack of speakers from the government's backbench highlighted that the ALP was still finding its feet in effecting compromise and developing good policy in the caucus room and the many other corridors of power in Brisbane. The legislation was left hanging as the creation of the Queensland Cabinet Office. The premier having left for a premiers' conference in Canberra on the morning debate commenced, the three ministers whose departments had effected the major compromises behind closed doors were left to defend the outcome. Most government backbenchers who did speak made it clear that they wanted to see more in the legislation. However, the caucus defeat of the proposals put forward by Matt Foley revealed that the silence and absence of most government backbenchers represented, at most, an endorsement of what the premier had proposed, and perhaps even a preference that less should have been granted to Aborigines. Aborigines in the gallery were left with the perception that government members had difficulty owning the bill. Those who wanted more in the bill spoke strongly; but most sat silent or were there only for the divisions.

At one stage, opposition members pursuing the usual fear campaign about land rights claimed that government members such as Matt Foley were happy to see farmers lose their land to Aborigines but were not prepared to hand over their own houses: "They never talk about giving away their own land. The Member for Yeronga never said a word about giving away their own land." "They will give away somebody else's land. They are just pirates; that is all they are. They will give away somebody



else's land but not their own."<sup>41</sup> Mr Foley at that moment happened to be up in the gallery with his wife and baby son. Aborigines around them laughed and said "We don't want your house, Matt. We don't want to take anyone's house." The gallery, rather than the chamber or the street was the place for representatives of the two laws to meet and to realise they had little to fear from land rights Queensland style.

## **7. The Wash Up**

The mode of consultation and introduction of this legislation marked the Goss government's formal abandonment, or at least selective use from now on, of the Fitzgerald processes of public consultation, discussion and accountability. Mr Goss knew land rights was an unpopular issue with the Queensland electorate. According to his priorities he had better things to do with his credibility than spend it on selling a land rights package which actually redistributed rights between Aborigines and other Queenslanders. He was happy to lead his caucus (which has never worn its heart on its sleeve for the benefit of Aborigines) to a gradual accommodation of Aboriginal interests and to a commitment for increased access by Aborigines to land provided no other citizens' interests were reduced and provided no other citizens had anything at all to fear. That is why he dedicated so much of his energies to ensuring the endorsement or at least silence of the major industry groups. Anxious to demonstrate his responsible caution, Goss, when announcing the legislation, was even prepared to make gratuitous remarks about the Northern Territory legislation. His remarks were sure to strengthen the case of miners and Northern Territory government ministers who have spent years pressuring the Hawke government to weaken Aboriginal control of access to land for mining purposes. He said he was happy to adopt the same approach to national parks as the Liberal/National Party government in New South Wales and the Country/Liberal government in the Northern Territory.

On the day after the passage of the Aboriginal Land Act, parliament passed a virtually identical Torres Strait Islander Land Act. The Torres Strait Islander legislation contained some linguistic differences, placing reliance on Island custom rather than Aboriginal tradition. It also provided greater recognition of the role of locally elected councils which were seen to be more representative of Island custom than the equivalent Aboriginal councils in

relation to Aboriginal tradition. The Islander Act restricts claims by Islanders to transferable and claimable land within the Torres Strait area which is the protected zone described in the Torres Strait Treaty - an area which includes islands north of latitude 10<sup>o</sup> 28'S. So it does not include Thursday Island, Horn Island or Prince of Wales Island. However there is provision in the legislation for the Governor-in-Council to declare any other area as part of the Torres Strait area. Once part of the Torres Strait area, land cannot be claimed as Aboriginal land under the Aboriginal Land Act. So it would be possible for the Governor-in-Council to declare Thursday Island, Horn Island, and Prince of Wales Island to be within the Torres Strait area.<sup>42</sup>

This Act also repealed the Queensland Coast Islands Declaratory Act 1985 which had been struck down by the High Court of Australia as a racist piece of legislation inconsistent with the Commonwealth Racial Discrimination Act. The 1985 Act had been passed at the instigation of the Bjelke-Petersen government attempting to thwart the litigation by Eddie Mabo and others who claimed traditional title to the Murray Islands and other associated islands and reefs. They had commenced their litigation in 1982. Queensland, being a defendant to the proceedings, had sought to short-circuit the court's determination of the matter by passing legislation which purported retrospectively to extinguish any property rights enjoyed by Eddie Mabo and his co-plaintiffs without compensation and without consent. Because the legislation singled out the property rights of Torres Strait Islanders for unjust extinguishment, the legislation was held to be invalid. In her second reading speech, Anne Warner said the legislation provided the means by which the Goss government "could distance itself in a direct and practical way from the racially discriminatory policies of the past". She described the 1985 legislation as "a cynical attempt" to extinguish property rights and that "it would be abhorrent to this government and an insult to this parliament if the legislation were to remain on the statute book."<sup>43</sup> There had been much speculation that the land legislation was being rushed through parliament so as to defeat the Mabo litigation which was about to commence in the High Court. The lie was given to that when argument in the Mabo case concluded on the morning of Friday, 31 May 1991. The Torres Strait Islander Bill was not passed by Parliament until later that day. It formed no part of the case put by Queensland to the full bench of the High Court.

After the passage of the Aboriginal land legislation, the government preached to Aborigines about the dangers of violent demonstrations. The premier said "people that behave in this fashion can forget about negotiation, they can forget about consultation. Until they can behave in a responsible way, they are not going to advance their cause at all."<sup>44</sup> Anne Warner spoke of the mindlessness of pushing down the gates of Parliament House : "It achieved nothing and I think it brought Aboriginal people into some controversy and disrepute".<sup>45</sup> Like previous Queensland ministers for Aboriginal affairs, she warned that the demonstrations had not advanced the aspirations of Aboriginal people. She sought to distinguish her government from its predecessors saying, "This is not the National Party government and (Aborigines) do not have to use a sledge hammer to crack a nut. There are ways of negotiating with a government which is prepared to listen, but in order to do that, they really must negotiate properly and not just shake their fists and mouths slogans."<sup>46</sup> She said her government was prepared to talk to Aboriginal people and the consultative process was not over - "it continues".<sup>47</sup>

When the state budget was handed down there was no special provision made for land acquisitions nor for wholesale gazettals of national parks which would require the establishment of boards of management. After five months delay which allowed the dust to settle, Anne Warner introduced the Aboriginal and Torres Strait Islander Land (Consequential Amendments) Bill to parliament. The major changes were to the provisions authorising the minister to change the trustees of existing DOGITs. In line with the ACC's original submissions, the amendments permit a community council to remain the trustees of land which is used or occupied for residential or community purposes. Community members can vote to retain the council as the controller of the community lands. If a substantial majority of residents want to keep the council as trustees, then the Governor-in-Council may grant the land under the new title to the community council.<sup>48</sup> Urban Aborigines and those landlocked by pastoral properties still obtained nothing. Yet again, they wait for the next round.

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1 Australian Labor Party (Queensland), Aboriginal and Islander Affairs Policy, 33rd State Conference, paras 1.5, 2.1, 2.3, 2.5, and 2.7.

2 Queensland Auditor-General, Supplementary Report on audits in respect of the financial year ended 30 June 1989, Government Printer, Brisbane, 1990, page 23.

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13 R. Weatherall to W. Goss, 26 April 1991.  
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18 W. Goss, Media Release, 20 May 1991, p. 1.  
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34 (1991) QPD 8175; 30 May 1991.  
35 (1991) QPD 8190-1; 30 May 1991.  
36 J. Maclean, Chairman, Aboriginal Co-ordinating Council, to W. Goss, 10 May 1991.  
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38 (1991) QPD 7661 and 7903; 22,28 May 1991.  
39 (1991) QPD 8203; 30 May 1991.  
40 (1991) QPD 8231; 30 May 1991.  
41 (1991) QPD 8194; 30 May 1991.  
42 s. 2.17, Torres Strait Islander Land Act, 1991.  
43 (1991) QPD 7777; 22 May 1991.  
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45 Anne Warner on Ron Henshaw's ABC Radio Programme, 31 May 1991.  
46 (1991) QPD 8316; 31 May 1991.  
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48 ss. 2.12(3) & (4), 3.02(4A), Aboriginal Land Act 1991, as amended by ss. 4 & 6, Aboriginal and  
Torres Strait Islander Land (Consequential Amendments) Act 1991.

# GOSS LAND RIGHTS, 1991

The contents of the Aboriginal Land Act turned out to be much as rumoured during the truncated consultation process. The legislation sets up a claims procedure for land once it has been gazetted as being available for claim. It provides a form of inalienable freehold title for existing Aboriginal reserves throughout the state.

## 1. Acknowledgments

It has become fashionable in legislation dealing with Aboriginal rights to insert a preamble which states lofty sentiments and gives some acknowledgment to the Aboriginal perspective of European-Aboriginal contact. The Queensland legislation contained ten acknowledgments:

1. Before European settlement land in what is now the State of Queensland had been occupied, used and enjoyed since time immemorial by Aboriginal people in accordance with Aboriginal tradition;
2. Land is of spiritual, social, historical, cultural and economic importance to Aboriginal people;
3. After European settlement many Aboriginal people were dispossessed and dispersed;
4. Some Aboriginal people have maintained their ancestors' traditional affiliation with particular areas of land;

5. Some Aboriginal people have a historical association with particular areas of land based on them or their ancestors having lived on or used the land or neighbouring land;
6. Some Aboriginal people have a requirement for land to ensure their economic or cultural viability;
7. Some land has been set aside for Aboriginal reserves or for the benefit of Aboriginal people and deeds of grant in trust are held on behalf of certain Aboriginal people;
8. The Parliament is satisfied that Aboriginal interests and responsibilities in relation to land have not been adequately and appropriately recognised by the law and that this has contributed to a general failure of previous policies in relation to Aboriginal people;
9. The Parliament is further satisfied that special measures need to be enacted for the purpose of securing adequate advancement of the interests and responsibilities of Aboriginal people in Queensland and to rectify the consequences of past injustices;
10. It is, therefore, the intention of the Parliament to make provision, by the special measures enacted by this Act, for the adequate and appropriate recognition of the interests and responsibilities of Aboriginal people in relation to land and thereby to foster the capacity for self-development, and the self-reliance and cultural integrity, of the Aboriginal people of Queensland.

## **2. Strengthening Existing Land Titles**

The existing DOGIT lands, all Aboriginal reserve lands, and the Aurukun and Mornington Island shire leases, as they were on 12 June 1991, the enactment day of the Act, became transferable lands under the Act.<sup>1</sup> As such, they are to be dealt with by the minister who presumably will be the Minister for Aboriginal and Islander Affairs. However, the Act does not specify which minister. As soon as practicable, the minister is to appoint grantees as trustees of these lands for the benefit of Aboriginal people.<sup>2</sup> These trustees need not necessarily be the existing elected community councils on DOGIT land. The trustees are to be issued with a new deed whereupon the land becomes transferred land and is thereby made claimable land.<sup>3</sup> Once land is claimable, Aborigines can go to the tribunal

which has the power to make a recommendation to the minister after a hearing about the grant of land title and the identity of trustees.<sup>4</sup>

Existing communities on DOGIT lands will therefore face two possible changes in the immediate future. The minister is empowered to create new trustees over the land. Once this is done, Aboriginal residents will then be able to go to the tribunal to agitate the issue again. This double process is contrary to the submission put by the Aboriginal Coordinating Council.

Finally the government acknowledged that it would be less disruptive to some Aboriginal communities if the minister, as a matter of course, were to renew the existing community councils as trustees of the land unless she were to receive a request for variation from the residents in a community. The November 1991 amendments addressed the ACC concerns. Now, when the Governor-in-Council is satisfied that existing Aboriginal land is primarily used or occupied by Aborigines for residential or community purposes, the minister may appoint the community council as the grantee and the land can be excluded from claim before the tribunal. Even if such land is not used primarily for residential or community purposes, the government may retain the existing trustees and preclude the land from further claim if "a substantial majority" of the Aboriginal people particularly concerned with the land are opposed to the land being claimable land.<sup>5</sup>

The defects in title of the old deeds of grant in trust have been set right by this legislation. Land previously excised for crown occupation and use will now be included in the deeds. Land subject to leases under the Land Holding Act will now be included in a deed of grant in trust. There will be no hovering clause permitting the crown to resume land for public purposes. Crown authorities will be able to enjoy use of crown buildings for the provision of services to communities without payment of any rent.<sup>6</sup> As with the old DOGIT, the trustees will be granted an estate in fee simple which can be revoked only by act of parliament.<sup>7</sup>

The existing provisions of the Mineral Resources Act are retained. They give trustees the power to withhold their consent to mining activity subject to the proviso that the Governor-in-Council can override this withholding of consent. This is not a veto in the Northern Territory sense. It is a simple re-enactment of the provisions enacted by the National Party when in government. It does give Aboriginal landholders in these cases more control over mining activity on their land than is enjoyed by ordinary freeholders in Queensland.

A deed of grant of transferred land will also include forest and quarry rights. These rights were promised by the previous National Party government. Though these rights will be included, the crown will retain the power to say that forest or quarry material is of vital state interest and therefore to be retained under crown control. If this occurs, the grantees of the land will be entitled to be paid reasonable compensation for the reservation or acquisition of their forest and quarry materials.<sup>8</sup>

Existing leases on DOGIT areas under the Land Act and the Land Holding Act will continue.<sup>9</sup> New leases will be grantable by the grantees to Aborigines who are particularly concerned with the land or to the crown in right of the State or the Commonwealth. Leases or licences may also be granted to other persons but only for a period of less than ten years unless the prior written consent of the minister is obtained.<sup>10</sup>

Before granting any interest in land, or before consenting to the creation of any mining interest, or before entering into any agreement with the crown for the sale of forest and quarry material, the grantees must first explain the proposal to the Aboriginal people particularly concerned with the land and give them adequate opportunity to express their views.<sup>11</sup> No interest is to be granted and no agreement made unless those people are generally in agreement with the proposal. However, if the grantees fail to gain the appropriate consent, this failure does not invalidate any interest or agreement finalised. So the only legal protection afforded is that interested Aborigines, if aware of a proposal being entertained by trustees, may be able to obtain an injunction from a court before the finalisation of any interest or agreement. Once the ink is dry, Aborigines who should have been consulted will have no recourse. The legislation provides a cooling off period of one month, after formal notification of explanation has been given to the Aboriginal people particularly concerned.

### **3. Land Claims**

Present Aboriginal lands represent 1.8 per cent of the state (3.4 million hectares). Under the Act, some vacant crown land will be available for claim. There may be up to an additional two million hectares (1.16 per cent of the state) available for claim. However, no such land will be claimable until it has first been gazetted by the Governor-in-Council as claimable land. Such gazettal may stipulate particular plots of land or it may speak generally



of vacant crown land in geographic regions. However, no vacant crown land is available for claim if it is situated inside the boundaries of a city or town or if it comes within an area which has been gazetted as township land which would be used for future urban purposes. Crown land which is reserved and set apart for public purposes is not available for claim;<sup>12</sup> neither are state forests nor timber reserves.<sup>13</sup>

The Cherbourg community, which resides on a DOGIT of 3,130 hectares adjacent to a timber reserve of 9,611 hectares, would need to have that reserve degazetted so that it could be vacant crown land available for claim. The Weipa land subject to special bauxite mining leases is not available for claim either, though it is vacant crown land.<sup>14</sup> In some cases, the government may permit a claim to land in between the high water and low water marks.<sup>15</sup> This should be the case at Aurukun. The bed and banks of watercourses or lakes will be claimable only if these water bodies pass through land which is claimable.<sup>16</sup> Even lands which are subject only to a permit to occupy or an occupation licence are not available for claim.<sup>17</sup> With the implementation of the Wolfe Report which reviewed land tenures in Queensland, it may be that some such permits and licences are cancelled, making the land available for claim.

Claimable land once granted will not carry with it timber and forestry rights.<sup>18</sup> In this regard, the title will be less than that of existing freehold. However, the special provisions of the Mineral Resources Act providing for Aboriginal consent to mining will apply if the land has been granted as an estate in fee simple.<sup>19</sup> Claimable land may be claimed on the basis of traditional or historical association. A claim on the ground of traditional affiliation will be established if the tribunal is satisfied that the claimants "have a common connection with the land based on spiritual and other associations with, rights in relation to, and responsibilities for, the land under Aboriginal tradition".<sup>20</sup> Aboriginal tradition is defined to be "the body of traditions, observances, customs and beliefs of Aboriginal people generally or of a particular group of Aboriginal people, and includes any such tradition, observances, customs and beliefs relating to particular persons, areas, objects or relationships."<sup>21</sup> A claim on the basis of historical association is established if the tribunal is satisfied "that the group has an association with the land based on the group or their ancestors having, for a substantial period, lived on or used the land or land in the local area".<sup>22</sup> If such a claim succeeds, the grantees will obtain an estate in fee simple. Land

claimed on the basis of need (or what the Act calls "the ground of economic or cultural viability") will not be subject to a freehold or inalienable title.<sup>23</sup> The grantees will obtain a lease which may be subject to conditions. Failure to comply with the conditions could result in forfeiture of the lease. The grantees of granted land which has been successfully claimed may deal with the land in the same way as the grantees of transferred land. The same provisions apply to leases and easements. The lease may be in perpetuity or for a specified term of years.

National parks also may be gazetted as being available for claim. Potentially this could make a further 3.84 million hectares (2.2 per cent of the state) available for claim in the foreseeable future. National parks would be claimable only on the basis of traditional or historical association.<sup>24</sup> No grant will be made unless the grantees have already agreed to lease back the national park to the crown in perpetuity, subject to such conditions as the Governor-in-Council determines. The premier indicated that "any rental for national park land paid to Aboriginal people will be on a peppercorn basis only".<sup>25</sup> It may be possible to negotiate a share in gate receipts. Aboriginal people having a special relationship with national park land will be represented on the board of management but they have no guarantee of being a majority on the board.

#### **4. Mining**

Some percentage, as yet undetermined, of mining royalties will be paid to the benefit of Aborigines.<sup>26</sup> The partial royalty equivalents will be split by a formula not yet determined between the grantees of the affected land and the chief executive of the government department who will administer those funds for the benefit of Aboriginal people generally in Queensland. The government has no intention of amending the Mineral Resources Act to provide compensation for disruption to social and spiritual relationships which are based on the land. It is doubtful whether under existing provisions compensation would be payable for disruption to the Aboriginal social and religious relationship with the land.<sup>27</sup> Compensation is payable only for the deprivation of possession of the surface of the land, diminution of the value of the land and improvements, diminution of the use made of the land and improvements, and for severance of any part of the land from other parts of the owner's land.<sup>28</sup>

The Goss government made much of the fact that it was not interfering with the agreement reached between the National Party government and the miners in determining the respective powers of Aboriginal landholders and miners. Under the Mineral Resources Act, owners of Aboriginal land have an absolute veto with respect to prospecting permits which are granted for basic hand mining. In relation to all other exploration or mining permits, the Aboriginal landholder's veto can be overridden by the Governor-in-Council. Aboriginal landholders do not enjoy any veto over petroleum exploration and development on their land. Under the Petroleum Act, those decisions are made by the Governor-in-Council. For all other types of mining, exploration permits are issued by the Minister for Resource Industries. However the holder of an exploration permit cannot enter Aboriginal land (except for land granted only on the basis of economic and cultural viability) without the consent of the Aboriginal landholder, or failing that consent, without consent from the Governor-in-Council. Given that there are no formally recognised land councils, the Department of Family Services and Aboriginal and Islander Affairs has a task of providing resources needed for Aboriginal landholders to avail themselves of independent advice in negotiating consent and conditions. The Queensland government is now committed to developing a code of conduct for mineral exploration on Aboriginal land. Presumably if an application for an exploration permit applied only to Aboriginal land, the Minister for Resource Industries would not grant such a permit unless the applicant had first received the consent of the Aboriginal landholder.

When the holder of an exploration permit wants to proceed to the grant of a mining lease, it is necessary for the land subject of the application to be marked out. Within seven days, an application for a lease is then forwarded to the Department of Resource Industries. Once a certificate of application has been prepared, the Department of Resource Industries then advises the Department of Family Services and Aboriginal and Islander Affairs of the issue of the certificate. At least 21 days are allowed for the lodgement of any objections. After the time for objections has lapsed, the applicant must within one week make a declaration that a true copy of the certificate of application has been posted on a datum post on the land during the objection period and that true copies of the application and certificate have been served upon the owners of the land and the relevant local authorities.<sup>29</sup> To date, government has not imposed any time limit on the

Aboriginal landholder's consideration of the application. Government policy has been to encourage direct contact between the landholder and the miner in the hope that a negotiated settlement can be made. Within seven days or such longer period as the mining registrar approves, a landowner may apply to the mining registrar for a conference to be convened with the applicant. Presently government favours allowing Aboriginal landowners up to one month to seek such a conference. If a conference is sought, the registrar then convenes and chairs the initial conference between the applicant and the owner. If negotiations fail to produce a satisfactory outcome, the landowner can lodge an objection to the application. This objection must be lodged within seven days of the conference. After at least another seven days the wardens court then holds a public hearing into the application. The warden makes recommendations to the Minister for Resource Industries regarding the grant of a mining lease and as to whether the Governor-in-Council should consent to the grant given the withholding of consent by the landholder. The Minister for Resource Industries then makes a recommendation to the Governor-in-Council, presumably first having consulted the Minister for Aboriginal and Islander Affairs.

For Aboriginal landholders to avail themselves of these procedures, they need to be adequately resourced. It will never be satisfactory for a government department to have the final say on the provision of such resources, especially when the government is known to be sympathetic to and supportive of further mineral development. Even if the department of Aboriginal and Islander affairs is to make financial grants to Aboriginal and Torres Strait Islander groups allowing them to engage consultants to provide the necessary advice, it will still be a departmental or ministerial decision to grant resources of fixed amounts to selected groups. These decisions ought not be made by government. It remains to be seen if the government's code of conduct requires the applicant to provide funds for ongoing discussions and negotiations by Aboriginal landholders.

The Aboriginal Land Act does not specify the percentage of royalties payable to Aboriginal land holders who consent to mining on their land. Presently the only mine operating on Aboriginal land in Queensland is the Cape Flattery silicon mine situated on the Hopevale deed of grant in trust area. The state presently receives one million dollars a year in royalty payments from that mine. Only \$60,000 of that royalty is distributed to the local Aboriginal community.

## **5. The Claims Process**

The Land Tribunal constituted under the Act will be chaired by a lawyer who on some occasions could sit alone but generally would sit with two other members, one of whom "has suitable knowledge of Aboriginal people or Aboriginal tradition"<sup>30</sup>, and the other of whom must have experience in industry, commerce, public administration, industrial relations, the practice of a profession or the service of a government or an authority of a government. A group of Aboriginal people may make a claim for an area of claimable land. If there is only one remaining descendant of a group, that person alone may make a claim. Claims on the basis of traditional affiliation have priority.<sup>31</sup> Claims on the basis of historical association would override a claim made only on the basis of economic or cultural viability. DOGIT land and the land at Aurukun and Mornington Island cannot be claimed on the basis of economic or cultural viability.<sup>32</sup> Where more than one claim is made to the one area, the claims are heard together.<sup>33</sup> Claims must be put in writing to the Land Claims Registrar.<sup>34</sup> Any person whose interest could be affected by the grant of land as Aboriginal land may apply to the tribunal to be made a party to the proceedings.<sup>35</sup> Generally lawyers will not be permitted to represent parties in proceedings.<sup>36</sup> Where possible, the tribunal will hold preliminary conferences so as to determine a claim without the need for formal hearing.<sup>37</sup> If two or more groups make out their claim, the land eventually will be granted to all successful claimant groups. The Tribunal may engage persons as consultants.<sup>38</sup> Appeals and questions of law are determined by the Land Appeal Court.<sup>39</sup> The tribunal makes its recommendation to the Minister who must be satisfied that the land should be granted.<sup>40</sup>

Aboriginal claimants are not liable for any survey costs or stamp duty.<sup>41</sup> Rates are still chargeable by local government authorities. These rates may be more than the service charges for services actually delivered on Aboriginal land. However, Aboriginal land, except for leasehold land granted on the basis of economic or cultural viability, cannot be sold for non-payment of rates except pursuant to an act of parliament that expressly provides for resumption of the land and the payment of just compensation for the land.<sup>42</sup>

To date, New South Wales is the only state to provide a statutory acquisition fund for Aboriginal land. No such fund is provided in the Queensland legislation. The Act envisages that some land will be acquired by or on behalf of Aboriginal people. Land such as a pastoral lease could be purchased by an Aboriginal group, surrendered to the crown, gazetted as being available for claim, and then claimed by its owners before the tribunal. If successfully claimed on the basis of traditional or historical association, an inalienable freehold title could then be granted to the land. However, it would not attract timber or quarry rights. Neither would it attract the special provisions of the Mineral Resources Act. For mining purposes, it would be treated as ordinary freehold. The owners of such land would run a slight risk that other Aborigines who have a higher claim to the land could succeed before the tribunal.

## **6. An Assessment**

The contents of the Aboriginal Land Act being much as rumoured during the truncated consultation process, there is little for the urban Aborigines. Unlike urban Aborigines in New South Wales, they have no access to a guaranteed statutory acquisition fund. They have no statutory recognition and resourcing of land councils. They are not able to claim any land in town and city areas even though it be vacant crown land. For them the only gain is the possibility of claiming land outside towns and cities on the basis of economic or cultural viability. Therefore, the Act cannot be the last word on Aboriginal land claims and entitlements in Queensland. The premier himself has described it as a foundation or platform for the future recognition of the just entitlements of dispossessed Aborigines to land. Urban Aborigines who form their own land councils deserve sympathetic support from government in the provision of resources. They continue to require access to funds for land purchases. There is no compelling philosophical reason why vacant crown land within town and city boundaries ought not be available for claim by urban Aborigines. Many clauses in the legislation commence with the words, "To allay any doubt". This novel drafting technique was a legal translation of the government's policy which was to allay any fears of non-Aboriginal citizens. Having allayed those fears, the government ought be able in the near future to permit claims to vacant crown land within towns and cities when such areas

have been gazetted as being available for claim because they are not needed nor likely to be needed for future public purposes.

The uncontroversial cleaning up and patching up of existing DOGITs has been effected in this legislation. However, the complex dual procedure which permits changes to trustees of DOGIT areas, first by the Minister and then later by the tribunal is concerning, especially in view of the specific submission put to government by the Aboriginal Coordinating Council which represents the elected councillors of the major Aboriginal communities. Lands which are subject only to permits to occupy or occupation licences ought be available for claim. The claims procedure and the style of landholding bodies are satisfactory. It is unfortunate that timber and quarry rights cannot be extended to newly claimed Aboriginal land. Also, it is regrettable that claims on the basis of need can result only in leasehold title being granted.

This Act does not actually create rights to land. It does, however, set up a statutory framework for a claims procedure to lands which become increasingly available for claim as the government exercises its discretion for gazettal. Those who have agitated for outright rejection of the legislation had no political guarantee that any other legislation would ever be enacted by any government at state or federal level to provide a statutory framework for the adjudication of claims and the granting of Aboriginal title to additional land.

The caucus debate and the media presentation of the conflicting arguments revealed that Aborigines had little chance of gaining more by way of legislative concessions during the first turn of the Goss government. Aborigines outside urban areas could be markedly better off than they were before the passage of this legislation. Aborigines living in urban areas are not worse affected by dispossession than they were previously by the passage of this legislation. Being substantially in compliance with what was rumoured, the legislation was a step forward. The legislation now has to be complemented by the generous exercise of government discretions and the provision of funds and resources necessary for Aborigines to represent their own interests with independence and professionalism. Then, and only then, might the laudable sentiments of the Act's preamble be seen to be a legislative expression of the will of Queenslanders to accommodate, recognise and uphold the legitimate aspirations of Aborigines to land.

- 1 s. 2.06, Aboriginal Land Act 1991.  
2 s. 3.03, Aboriginal Land Act 1991.  
3 s. 2.12, Aboriginal Land Act 1991.  
4 s. 4.16, Aboriginal Land Act 1991.  
5 s. 2.12(4), Aboriginal Land Act 1991, as amended by s.4, Aboriginal and Torres Strait Islander  
Land (Consequential Amendments) Act 1991.  
6 s. 6.01, Aboriginal Land Act 1991.  
7 s. 3.13, Aboriginal Land Act 1991.  
8 ss. 18, Aboriginal Land Act 1991.  
9 ss. 3.06, 5.08, Aboriginal Land Act 1991.  
10 ss. 3.11, 5.13, Aboriginal Land Act 1991.  
11 ss. 3.11, 5.13, 6.03, 9.02, Aboriginal Land Act 1991.  
12 s. 2.13 (i) (c), Aboriginal Land Act 1991.  
13 s. 2.13 (i) (d), Aboriginal Land Act 1991.  
14 s. 2.13 (i) (g), Aboriginal Land Act 1991.  
15 s. 2.15, Aboriginal Land Act 1991.  
16 s. 2.14, Aboriginal Land Act 1991.  
17 s. 2.19 (d) & (e), Aboriginal Land Act 1991.  
18 s. 5.18 (2), Aboriginal Land Act 1991.  
19 s. 7.01 (2), Aboriginal Land Act 1991.  
20 s. 4.09 (1), Aboriginal Land Act 1991.  
21 s. 2.03, cf. s. 3 (1) definition in the Aboriginal and Torres Strait Islander Heritage Protection Act  
1984 (Commonwealth).  
22 s. 4.10 (1), Aboriginal Land Act 1991.  
23 s. 4.11 (1), Aboriginal Land Act 1991.  
24 s. 5.20, Aboriginal Land Act 1991.  
25 W. Goss, Media Release, 20 May 1991.  
26 s. 7.02, Aboriginal Land Act 1991.  
27 s. 7.38 (3), Mineral Resources Act 1989-90.  
28 s. 7.38 (3), Mineral Resources Act 1989-90.  
29 s. 7.18, Mineral Resources Act 1989-90.  
30 s. 8.03 (2), Aboriginal Land Act 1991.  
31 s. 4.17 (1), Aboriginal Land Act 1991.  
32 s. 4.03(3), Aboriginal Land Act 1991.  
33 s. 4.08, Aboriginal Land Act 1991.  
34 s. 4.04, Aboriginal Land Act 1991.  
35 s. 8.17(1)(c), Aboriginal Land Act 1991.  
36 s. 8.19, Aboriginal Land Act 1991.  
37 s. 8.21, Aboriginal Land Act 1991.  
38 s. 8.38, Aboriginal Land Act 1991.  
39 s. 8.29, Aboriginal Land Act 1991.  
40 ss. 4.16 & 5.01, Aboriginal Land Act 1991.  
41 s. 9.08, Aboriginal Land Act 1991.  
42 ss. 3.13 & 5.15, Aboriginal Land Act 1991.



## CONCLUSION

Between 1982 and 1989, Queensland Aboriginal and Islander leaders fought a lonely campaign for secure title over their community reserve lands. They won against a government which enjoyed and thrived on a reputation for being opposed to land rights. They won with no help from the government in Canberra which was strong on land rights rhetoric. When secure title was finally granted at Yarrabah on the day before the 1986 state election, the council chairman, Mr Roy Gray said, "From today, we own this land, even in the eyes of our colonisers." That ownership has now been consolidated by the Aboriginal Land Act 1991. The Goss government has been willing to set up a claims process to land outside town areas provided it is not required for any other purposes. The ALP has not been prepared to recast the balance of rights between Aboriginal landholders and miners. The concessions won by Aborigines from the Nationals for timber, quarry and mining rights were all that the new Labor government was prepared to implement. Strong Aboriginal supporters in the caucus, like Matt Foley, may have helped to place land rights on the new government's agenda but they were as powerless as Aborigines and their other advocates in winning more rights than other vested interests were prepared to concede in their secret negotiations with government.

From 1982, Aboriginal reserve leaders fought a concerted campaign for the recognition of their rights. Once they had convinced the Queensland Nationals to amend the Land Act to make special provision for Aboriginal

communal title, they and their supporters were able to force further special amendments providing inalienable freehold title. When the Nationals used the rhetoric of treating all Queenslanders alike, Aborigines were able to invoke the same rhetoric to challenge discriminatory legislative measures which required detailed accountability to government for the expenditure of Aboriginal council funds.

The Goss Labor government has been prepared to set up a claims process for vacant lands, but it will not commit itself to recurrent funding for land councils or acquisition of additional lands for dispossessed Aborigines. There is no legal impediment to the Commonwealth meeting the Queensland shortfall. No major political party at a national level has any interest in so doing.

In August 1991, the Australian parliament unanimously passed legislation establishing a Council for Aboriginal Reconciliation. The Council of twenty-five members will exist until 1 January 2001, the first centenary of the Australian federation. Chaired by an Aborigine and assured a majority of Aboriginal and Torres Strait Islander members, the council will undertake a public awareness and education campaign to create a better understanding in the community of Aboriginal issues. During its first term, the Hawke government decided not to launch such a campaign, despite ANOP's research which demonstrated its need and possible effectiveness. It is now a case of "better late than never".

The council is also to assist in getting all levels of government in Australia to co-ordinate their responses to Aboriginal requests for assistance in relieving poverty, disadvantage and dispossession. The newly established ATSIC, with its sixty elected regional councils and twenty commissioners who set national policy for Aboriginal services and enterprises, is having its teething problems. But it now has the power to allocate funds and to determine priorities at a national level. It will have to be involved in any attempt at fostering inter-governmental co-operation. Since the bloody land rights consultation in Queensland in May 1991, ATSIC has not shown any willingness to involve itself further in Queensland Aboriginal land matters, other than to allocate funds to regional councils wishing to review the state legislation. ATSIC does not see itself as having any role in providing a system of state land councils nor in setting up an independent resource agency to assist local Aboriginal groups prepare their land claims. ATSIC's

on-going support for the reconciliation council will be essential. It remains to be seen if the council buys into state questions like land rights.

The council's least defined and most controversial role is, in the words of its principal architect, Minister Robert Tickner, "to consider whether reconciliation between Aboriginal and non-Aboriginal people would be advanced by a formal document or documents".<sup>1</sup> With Mr Hawke having abandoned his treaty talk of 1988, Dr Hewson has had no need to repeat the Howard threats that any treaty would be torn up. The politicians' unanimous endorsement of the council guarantees the council's consultative role for 10 years, whoever is in government. The test of bipartisan support will come if and when the council recommends legislative or constitutional reform guaranteeing or granting for the first time the rights and entitlements of Aborigines not just as ordinary Australian citizens but as the indigenous people of the continent. There is no agreement among politicians nor is there any community consensus about the rights or special entitlements Aborigines ought to enjoy once poverty, dispossession and disadvantage are alleviated. It is a key issue requiring further debate in the decade reviewing the Australian Constitution.

Since its abandonment of national land rights proposals in 1986, the Hawke government has tried hard to build trust again with Aboriginal groups and leaders. It has increased funding for services consistently and set up ATSIC despite serious misgivings from state governments and Aborigines who were not attracted to a government sponsored and funded organisation which attempted to combine representative, advisory and administrative processes. Tickner is the first Minister without a department. Besides defending and advocating ATSIC's cause in Parliament, he liaises with other ministers to ensure the Aboriginal viewpoint is represented in cabinet decisions. Minister Clyde Holding tried national land rights; Gerry Hand ran on ATSIC; and Robert Tickner's hallmark is reconciliation. Addressing the concerns of his more cynical critics, Tickner has made his own the cry: "No reconciliation without justice". Unfortunately his government's federalist approach on land rights is now indistinguishable from that of the coalition. Land rights is a matter for the states. If the states default, as has Tasmania with its Upper House's rejection of a very modest land rights package, or if they fall short, as has Queensland which made no provision for urban land acquisitions or claims

in its legislation, the Commonwealth will do nothing. Tickner made this clear in his 1991 Geneva address to the Working Group on Indigenous Populations. Conceding that there are still some dispossessed Aborigines in the Northern Territory, he said, "The Australian Government remains committed to addressing the remaining unmet land needs of Aboriginal people in the Northern Territory."<sup>2</sup> He could give no similar commitment to the many dispossessed in the states. He could offer them only the "publicly expressed hope" that state governments will act - no carrot and no stick, even with state governments of his own party.

But worse than that, the Napranum community at Weipa in Cape York, which was dispossessed of half its land to accommodate Comalco's strip mining of bauxite, was threatened with further dispossession by the Commonwealth itself in 1991. The traditional owners there were eligible for a state grant of inalienable freehold over land which the Commonwealth wanted to acquire compulsorily for a new RAAF base. The Aborigines had offered the Commonwealth a lease of their land. Unyielding and unsympathetic to Aboriginal claims to retain title to their land which was to be granted for the first time by Queensland, the Commonwealth had "requested the State to proceed with the appointment of trustees as quickly as possible, so that we can then negotiate directly with the trustees for the purchase of their interest in the land."<sup>3</sup> The traditional owners had reconfirmed their earlier stand: "We are happy to talk about leasing some of our land to you. But we will never agree to your taking away our land rights without our consent."<sup>4</sup> If these traditional owners had lived in the Northern Territory, the Commonwealth would have let them be. Commonwealth initiated reconciliation would mean nothing to these people if the Commonwealth itself were to dispossess them by compulsorily acquiring their land. After further discussions, the Commonwealth has reviewed its situation and will probably now be agreeable to leasing the land from the Aboriginal landowners. This simple case highlights the need for special legal protection and policy co-ordination of government departments to ensure the justice on which we might build reconciliation through recognition of indigenous rights. The Council for Reconciliation will fail unless it recommends a workable legal device for ensuring the recognition and priority of Aboriginal rights and entitlements by 2001.

The ATSIC regional councils are permitted to purchase land if funds are made available for their regional land funds. These councils can also set

up advisory committees which could assist people with land claims. Through a co-operative federalist approach the land needs of all Aboriginal groups in Queensland could be met.

In the next few years, there will be a major overhaul of the laws providing Aboriginal communities with self-management powers at the local government level. The all Aboriginal Legislation Review Committee in Queensland has published a discussion paper entitled "Towards Self-Government" calling for recognition of "the pre-existing rights of Aboriginal and Torres Strait Islander people to self-government" and the granting of powers to indigenous communities "to control their local and internal affairs, their physical and cultural survival and development, and their economy and resources".<sup>5</sup> The committee has argued for these rights and powers to be granted not only to communities guaranteed land tenure and local autonomy in their own local authority area but also to those communities "that have or will acquire title to land within a mainstream local government area" and those "without any community title to land, but which may operate a housing or other association within a mainstream local government area".<sup>6</sup> There is sure to be a continuing gap between these Aboriginal aspirations and the laws and policies enacted by the Queensland government, which ever party is in power.

At the request of local Aboriginal groups, church leaders will have a continuing role to play in the political process, insisting on the need for local consultation and participation, and discerning the morality of Aboriginal claims for special treatment and measures not so much in the future because they are poor, disadvantaged or dispossessed but because they are the indigeneous people of the land. Rarely will there be broad Aboriginal agreement on both outcomes and strategies. The leaders of Aboriginal organisations are only starting to work together at a state level in Queensland. It is essential that local Aboriginal community leaders be sufficiently informed and resourced to put their case to government. Inevitably TV reporters seeking for "the one-minute grab" will continue to focus on Aboriginal media personalities who enjoy a national profile. Aboriginal protesters and their supporters will be most successful in promoting change in the terms of debate when their message reflects the aspirations of local Aboriginal communities which are working quietly and painstakingly putting their reasoned submissions to government.

In the concluding chapter of his report in the Royal Commission into Aboriginal Deaths in Custody, entitled "Aboriginal Aspirations and Natural Justice," the Aboriginal commissioner, Mr Patrick Dodson, focused on the quality of personal relations between Aborigines and government officials:

Structures, orders, regulations and guide-lines tend not to be what produces good relationships of their own accord. They, of course, need to be designed to bring about the good of the relationship, but it is the quality of the interpersonal contact that is paramount for the Aboriginal person. People who take a meticulous statutory option to their role and responsibilities, find their relationships with Aboriginal people are often going to be perceived as insensitive and uncaring, which leads to an impaired basis for a quality relationship. Friction, conflict, fear and anger build up quickly on both sides in these types of situations.<sup>7</sup>

Seeking a way forward, he gave primacy to "processes and respect" over "questions of absolute principle".<sup>8</sup> He argued this must be done at the regional or local level:

When structures and organisational formats are imposed and thrust upon Aboriginal people, there is no sense of ownership developed. Such things tend to come from outside Aboriginal considerations and initiatives. When there is no sense of ownership, there is no pride. For pride to be advanced, there needs to be control and sensitivity to enable delivery and participation. Without these dynamics being put in train, there will be repetition of past patterns of rejection, failure and resistance.<sup>9</sup>

He urged a change in mindset for government from consultation to negotiation:

Aboriginal people have had to live through various structures and policies imposed on them by successive forms of government. . . . It has been through the exercise of authority and power aimed at fitting Aboriginal people into something non-Aboriginals have invented, that has been most problematic. Despite being colonised, culturally and economically marginalised and incarcerated throughout the brief history of this nation, Aboriginal people still do not respond the way non-Aboriginal people would always like them

to. Gradually government instrumentalities have made attempts to allow 'advisory' roles for Aboriginal representation. This has taken place through consultative mechanisms, and all suffer from an obvious lack of power to effect and implement advices. There was also little or no control over the procedure and practices that accompanied implementation of what-ever government made of the advice or consultation. In my view, processes of consultation should become processes of negotiation.<sup>10</sup>

In his report, Dodson put to rest some of the more romantic notions about contemporary Aboriginal life and the ideal interpretations of Aboriginal law. With a sense of realism rather than fatalism, he sees the need and admits the desire for many Aborigines to negotiate and participate with their fellow Australians. To date, Aborigines in their local communities have, in Dodson's view, had "no confidence in the morality of non-Aboriginal society". They have not been treated as equals, let alone as citizens with a special claim on the state to their own local autonomy. Looking to the future when hopefully fewer Aborigines will be poor, disadvantaged and dispossessed, we need to find a way whereby local communities can be assured their dignity and accorded respect for themselves and their ways as they seek assistance from the state.

During the last decade I have met many Aborigines in communities through Australia who are crying out: "We know we have problems. We know they are our problems. We know many of these problems would not have occurred but for the clash of cultures and the enforced dispossession of our ancestors and the continued disadvantage and poverty we suffer. We know that we have to find the answers and work at implementing them. We know we need help We want help - but help which respects our dignity and accords us our due autonomy as indigenous people. We know our traditional law cannot provide all the answers in this new, rapidly changing world which attracts, shapes, and sometimes twists our children and our young people. To solve these problems we do not want to become just like the colonisers and migrants in our land. We want to solve these problems our way so we can continue to live our way - not like our ancestors did. Those days are gone. And not like white Australians live. We want our way to be strong so our young people will be proud to choose it whatever happens." As Dodson puts it: "Negotiation needs to replace consultation and advisory postures, and local or regional priorities and cultural

sensitivities should be upper most in consideration. However, rhetoric and ideologies can become more important than achievement through compromise. Compromise can be seen as prejudicial to principles of indigenous rights. The argument should, in my view, centre more around Aboriginal governance without a clear distinction between notions of sovereignty and Aboriginal rights under various legislation.”<sup>11</sup>

Through local negotiation set within realistic parameters, Aboriginal communities may piece together systems of community governance on their lands so as to increase their chances of keeping afloat and mobile in the sea of all cultures, remaining true to themselves and their ancestors. Imposed solutions will achieve nothing. Government with and at the request of local communities might keep in check the manifestations of long enforced social alienation and powerlessness and even remedy the causes embedded in a shattering colonial history. The children of John Koowarta, Alwyn Peter and Deidre Gilbert want to live in the best of all possible worlds, being Aboriginal but open to all the world has to offer, not being swamped by it, being able to stay afloat, able to make sense of it, able to embrace the mystery of it, even able to shape it, and able to hand on to their children the uniqueness of their culture and the universal possibilities of life in the modern world. Land rights secures the space for this to happen. Self-management provides the freedom. Social processes and legal outcomes go together to make up land rights Queensland style which in the words of the preamble of the Aboriginal Land Act 1991 can “foster the capacity for self-development, and the self-reliance and cultural integrity, of the Aboriginal people of Queensland”. Justice and recognition are preconditions for the reconciliation which can assure all Australians that they are secure, belonging to this land.

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- 1 R. Tickner, Address to Working Group on Indigenous Populations, Geneva, Ninth session, 22 July - 2 August 1991, p. 4..
  - 2 *Ibid.*, p. 7.
  - 3 N. Peach, Department of Administrative Services, to Chairman, Napranum Community Council, 16 July 1991.
  - 4 M. Wilson, T. Coconut, M. Dick, Z. Boxer and R. Gibley (Traditional Owners) to N. Peach, 16 August 1991.
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  - 6 *Ibid.*, p. 13.



## Conclusion

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- 7 P. L. Dodson, *Regional Report of Inquiry into Underlying Issues in Western Australia*,  
volume 2, *Royal Commission into Aboriginal Deaths in Custody*, (Canberra: AGPS, 1991) p. 767.  
8 *Ibid.*, p. 770.  
9 *Ibid.*  
10 *Ibid.*, pp. 778-9.  
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# LAND RIGHTS QUEENSLAND STYLE

In the last decade, the Queensland parliament passed more laws regarding Aboriginal land title than any other parliament in Australia.

In that time the government went from National-Liberal to National to Labor. The law changed in many ways. Yet the Aboriginal struggle for land rights and self-management continues.

Each step of the changes, from the Bjelke-Petersen era up to the Goss land rights package of 1991, is critically examined resulting in this important and telling political history of black rights and the dynamics of reform.

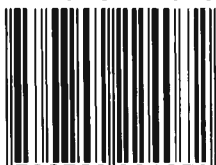
This is a clearly written guide to the many and complex pieces of legislation which now govern both Aboriginal lands and local government in communities throughout Queensland. Author Frank Brennan, a barrister closely involved in the negotiation of Queensland laws relating to Aborigines, offers a revealing view of the countdown to social justice.

*Cover illustration by Dave Russia*

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